

AN
E S S A Y

On the LEARNING of

Contingent Remainders

AND

EXECUTORY DEVISES.

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AUTHOR OF THE LEGIGRAPHICAL CHART OF
LANDED PROPERTY.

Scire autem propriè est, rem ratione et per causam cognoscere.

IN TWO VOLUMES.

VOL. II.

Of EXECUTORY DEVISES.

THE FOURTH EDITION,

WITH NOTES AND COMMENTS,

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LONDON:

PRINTED BY A. STRAHAN,

LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH, IN FLEET-STREET.

1795.



ADVERTISEMENT.

THE very high estimation in which the Essay on Contingent Remainders and Executory Devises is held, renders it unnecessary for the Editor to offer any observations on its intrinsic merit. The intention of the Author was to improve and enlarge the present edition of that part of the Essay which treats upon Executory Devises, as he had that which relates to Contingent Remainders, but unfortunately for the profession, his death when he had completed only the first sixty six pages of this part of the work, has deprived them of the advantages which would have been derived from his intimate and superior knowledge of this abstruse branch of learning. Application was made to the Editor, in *December* last, by some particular friends of Mrs. *Fearne* to superintend the com-

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pletion

pletion of this volume, the immediate publication of which, for her sole benefit, was then in contemplation. The Editor was sensible of his inability, to supply the loss the work must sustain, from the death of the Author, but he was induced to undertake what was requested, as well from the respect he bore to the memory of Mr. *Fearne*, with whom he had the honor of a very long acquaintance, as from his inclination to render any service in his power, to a most amiable and worthy woman.

THE Editor was able to form a judgment of the manner in which Mr. *Fearne* meant to enlarge the present volume, from a copy of the last edition, in which there were some notes and references, indicative of his intentions. From this copy it appears that after twenty years experience in the highest practice, the Author saw no reason either from further reflection or forensic decisions, to alter his original sentiments, except in
I the

the single instance of an Executory Devise, being an interest transmissible by testamentary disposition, which in the former edition was held by him not to be deviseable. Indeed his opinions upon these subjects, were in general founded upon such excellent reasoning, that they carried great weight in his lifetime, and therefore there can be no doubt, but that they will be considered as of the highest authority after his death. This circumstance induced the Editor, who was left at discretion, either to enlarge the body of the work, or to introduce such matter as he thought proper by way of note, to prefer the latter mode, as it preserved the identity of the original publication. The Editor has pursued the hints suggested by the author in the *selection* of the *new subjects*, upon which he has treated in the notes to this edition, and has further illustrated the propositions laid down by the author in the former edition by the introduction of such cases and authorities as seemed to him relevant.

THE plan of the Author in the first volume, of preserving the pages of the last edition, by a marginal registry of them in the present edition, has been pursued in this volume; and the marginal references in the body of the work remain, as in the last edition, and are referable to the old pages. The references in the notes, in most instances, where they are to preceding pages, are made to the pages as marked in the present edition; but where they refer to subsequent passages, they relate to pages in the old edition.

IN the latter end of a note, page 399. the effect of a condition, annexed to a preceding estate, which is too remote, and consequently makes the ulterior limitations equally remote in their creation, is considered as a question still undecided, and the substance of an opinion of Mr. *Fearne* of a very late date upon the subject is introduced. It did not occur to the editor until a subsequent revision, that the case of *Proctor* and the

the *Bishop of Bath and Wells*, stated to illustrate another proposition, page 156, had decided that question. But although, had he adverted to that circumstance, this opinion which was given on that identical case, would have been omitted, yet he trusts, it places the subject in so clear a light, that it will be considered as a valuable elucidation of the principles on which the decision was framed.

THE new matter, and cases introduced in the present Edition, are distinguished in the respective Index's by being inserted in *Italics*.

THE abstruse nature of the subjects which the Editor was called upon to discuss, would have induced him to have postponed the publication for a longer period, but had he indulged that wish, the main object which weighed with him in undertaking the work, that of rendering an immediate service to Mrs. *Fearne* must have been sacrificed. He therefore trusted to the indulgence of a

liberal Profession, which he entertains no doubt will make due allowances for this circumstance. He flatters himself he has taken sufficient care not to mislead, and that if that end is attained he shall escape the lash of Criticism, should any inadvertency in other respects have escaped his attention.

*Gary Street,
6 November 1795.*

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The Reader's Attention is required to the
following Corrections.

Page	Line.
2	10 strike out <i>above</i> and substitute in the pre- ceding volume.
5	opp. 9 in the margin, for <i>supra</i> read <i>vol. 1.</i>
	24 for <i>John</i> read <i>J. C.</i>
23	20 strike out <i>not.</i>
52	26 for <i>A.</i> read <i>W.</i>
53	6 for <i>A.</i> read <i>W.</i>
	8 for <i>A.</i> read <i>W.</i>
71	10 for <i>entring</i> read <i>entering.</i>
91	7 for <i>B. M.</i> read <i>W. B.</i>
92	27 for <i>there</i> read <i>their.</i>
138	12 for <i>F.</i> read <i>A.</i>
157	15 for <i>in support of</i> read <i>against.</i>
160	26 for <i>alteration</i> read <i>alienation.</i>
254	24 for <i>into</i> read <i>in to.</i>
271	21 for <i>incertainty</i> read <i>uncertainty.</i>
389	3 for <i>will</i> read <i>would.</i>
381	in note 23 for <i>is</i> read <i>by.</i>

A N

Executory Devise defined,

A N D

Its several Kinds distinguished.

AN executory devise is defined to be a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon some future contingency.—This is the definition commonly given of an executory devise. It comprehends indeed every species of an executory devise; but at the same time it is not confined to executory devises only; it includes every kind of contingent interest in lands given by devise, (for every contingent interest must necessarily be future); now every contingent interest in lands limited by devise is not an executory devise, for some contingent interests by devise are contingent remainders; therefore such a definition must be considered as defective in point of precision and accuracy.

1 Eq. Abr.
186.

An executory devise is, strictly, such a limitation of a future estate or interest in lands

(299)

Carth. 310.
 Reeve v.
 Long.
 4 Mod. 258.

or chattels (though in the case of chattels personal, it is more properly an executory *bequest*) as the law admits, in the case of a will, tho' contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise, as to fall within the rules above laid down for the limitation of contingent remainders; such an interest is not an executory devise, but a contingent remainder.

4 Mod. 284.
 Purefoy v.
 Rogers.
 2 Saund. 380.
 Supra, p. 242

And vide
 2 Vezey 616.

As where a testator devised to his wife for life, and to her son after the death of his mother, if she should have a son, and if he should die within age, then to the right heirs of the devisor; the testator died without issue, his wife married again, then the heir of the devisor by fine conveyed the reversion to the husband and wife, who had afterwards a son born; it was adjudged, that the estate limited to that son should not enure by way of executory devise; because that is never allowed where a contingent estate is limited to depend on a freehold capable of supporting it; here the mother had a preceding freehold in herself, therefore it was adjudged a contingent remainder in her son; and the heir at law, having a reversion in fee in him by

by descent, it was held, that the remainder was destroyed by his conveying the reversion to the particular estate of the mother, before the son was born.

So where a testator, in case his eldest son (300) should die and leave no issue of his body, then after his decease gave the lands to his youngest son and his heirs ; it was held that the eldest son took an estate tail by implication, and that the devise to the younger son was a remainder : for that words should not be construed to give an estate by way of executory devise, but where the devisee cannot take any other way.

Walter v.
Drew. Com.
Rep. 372. &
infra. 362.

And again, where a testator having charged certain legacies upon his lands, devised, that in case his son T. should happen to die before he married, or being married should have no children lawfully begotten, then his lands should remain and descend equally to his daughters and their heirs, paying &c. except such jointures as his son should happen to make upon his wife, not exceeding &c. and in case both his daughters should die without being married, or being married should have no children of their respective marriages, then he willed that all his estate should descend to his nephew J. M., and at the end of the will he gave and devised to his son T. all his estate real and personal not already dis-

Wealthy v.
Bosville,
Rep. K. B.
temp.
Hardw. 258.

361)

posed of by his will. After the testator's death, his son *T.* entered and suffered a recovery to the use of himself and his heirs, and died without issue; upon which his sisters entered and suffered a recovery, and died without issue; upon which the heir of *J. M.* entered.

The question was, whether the devise to *J. M.* was a remainder depending on a particular preceding estate in the son and daughters, or whether it was an executory devise? And it was contended that if the son took any estate by the will, it must be an estate-tail; but that this could not be for want of express words, and that here was no necessary implication. But Lord *Hardwicke* was of opinion, that there were two rules which went a great way in determining the case; *first*, that it is immaterial which words come first or last, for the construction must be made upon the whole will; *secondly*, that no limitation shall be construed to be an executory devise, if it may be a remainder. That here in the subsequent part of the will was an express devise of all the residue, so that take the two clauses together, here seemed to be an express devise to the son, and it was given by the word *estate*, which was sufficient to carry the fee; so that it amounted to a devise to the son and his heirs, and if he died without issue, remainder &c. and that was nothing but an estate-tail; but

but if that were not so clear, yet as to the daughters, he thought no objection could be raised; for there was a devise to them, and if they died without children, &c. so that their recoveries at least were sufficient to bar the nephew's remainder; and judgment was given accordingly.

(302)

And we find that Lord *Hardwicke* referred to the same rule in the case of *Ives v. Legge*, noticed in a former page.

Ives v. Legge
supra 296.

The same doctrine prevailed in a subsequent case before Lord Keeper *Henley*; where (according to a manuscript note of it with which I have been favoured) a settlement was made previous to the marriage of *J. C.* by which the lands in question were limited to trustees and their heirs, to the use of *J. C.* (the settler) for life; remainder to *M. W.* (his intended wife) for life (*except in such cases as should be thereafter excepted*) for her jointure; remainder to the heirs of the body of the said *J. C.* begotten on his said intended wife; remainder to the said *John* and his heirs; followed by a "*proviso, and the special trust and confidence in the said trustees and their heirs was thereby declared to be, that if the said J. C. should happen to die, and leave such issue as aforesaid behind him, be the said J. C. not making otherwise a provision for such child or children in his life-time, then*

Carwardine
v. Carwardine,
in Chan. 28
Jan. 1758.

and in such case the said trustees should stand seised of one moiety of the said premises from and immediately after the decease of the said J. C. to the use of such child or children as aforesaid, and be empowered, out of the rents, issues, and profits of the said money, to raise such provision for such child or children as the said trustees and their heirs should think fit."

J. C. and M. his wife after their marriage joined in levying a fine; and he by will devised all his estate from his eldest son, who was totally disinherited and left wholly unprovided for.

The principal question in the case was, whether the plaintiff, who was the eldest son of J. C. was intitled to any, and what provision under the proviso in the said settlement?

It was argued for the said eldest son, that the estate in the trustees, under the proviso, remained untouched by the fine, which could not bar executory devises and springing uses; which being collateral to the other estates and remainders immediately carved thereout and independent thereof, could not be affected by any deed which respected them. That the exception being introduced between the estate for life of the wife, and the remainder to
 2 the

the heirs of the body of her husband by her, it was antecedent to the estate tail, and the fine would not reach it—That a difference was laid down between a collateral use that does not depend on other estates, and an estate limited by way of remainder—That in case of springing uses (as that was contended to be) and of executory devises, the whole fee given before, need not be disturbed; but the estates before given might open to receive and let in the use upon the contingency happening; and so there it let in the new estate, but did not operate to take away any of the estates before given—That being so, the next question was, who was the person intended to take by the proviso; and then, what he should take?—That the ground of the provision was in favour of an eldest son and him only. In the limitation of the estate the words were “*heirs of the body*” under which the first son would take the whole; that in the proviso the words were “*such issue as aforesaid*” which could relate only to the *heirs of the body*; and the words *child* and *children* were afterwards mentioned in the proviso, yet they must and could refer only to *such issue aforesaid*, viz. “*heirs of the body*”—As to what estate such eldest son would take, it must be a fee simple in one moiety; for the trust and confidence being to

the trustees and *their heirs*, the estate must be co-extensive with the trust.

On the other side it was said, the first question was, whether under the settlement, which was a conveyance of the *legal estate*, the provision was in the power of the father, and any thing was left untouched by the fine?—That this point would depend upon the question, whether it was to be considered as a *contingent remainder* or as a *springing use*? For if it was the first, it was clearly barred by the fine; for which they referred to *Archer's case*—That the maxim of law being, that a fee could not be limited upon a fee, springing uses arose in order to give persons a power to provide for all the exigencies of their families, and therefore the court permitted them to arise within a reasonable compass of time (as in the compass of a life and during the infancy of the first taker, as in *Lloyd and Carew*) and that a springing use is in a deed, what an executory devise is in a will, and the same rules are applicable to both—But that a springing use always displaces the former estates where the whole fee has been departed with—That a feoffment to the use of *A.* and his heirs to commence four years from thence was good as a springing use; so after the death without issue, if
he

Archer's case,
1 Co. 66.
Supra p.
102.

Supra 199.

Davis
v. Speed.
Supra 93.

he died without issue in 20 years, it was good by way of springing use; because what was left undisposed of, was in the feoffor in the mean time, and just in the same state as before the conveyance. And that is a certain rule, that it should never take effect by way of springing use or executory devise, where it could possibly take effect by way of remainder—That although where the whole fee is disposed of, you may make a new disposition thereof, to arise within a reasonable compass of time, yet there must be always a particular estate to *support a remainder*. For the law always takes care, there should be a tenant to a freehold liable to the actions of all persons who claimed any right. And that wherever there is such a particular estate, any limitation afterwards, must be construed a remainder. And in the case in question, it must be considered, as if the limitation to *such issue*, had been placed in the *parentesis* where the *exception* is to the wife's estate. And then, where the limitation was in the *middle of the disposition* of the fee, as in that case, it must always be construed a *remainder*. That in a springing use, the whole estate (*that is to be displaced*) vests. But in the case then in argument, the mother took an estate for life only in one moiety. As to the other moiety it was contingent, whether it could vest or not; and depended on the father's dying

dying in the life-time of the mother, and leaving such issue unprovided for; and therefore was a contingent remainder, and barred by the fine—That as the father had a power to bar the heirs of his body, he might certainly bar the lesser provision. But in all events, it was not a provision for one child absolutely, but all the issue of the marriage unprovided for, and could be a provision for no longer than the mother's life, subject to the discretion of the trustees.

The Lord Keeper, after observing that the question arose upon a deed very imperfectly and inaccurately penned; and was a question *of law* arising upon a *legal conveyance*, a settlement executed and not on *articles*, or by way of *trust executory*, divided the consideration of it into two points—1st. The intention of the parties to the deed—2dly. The legal operation and effect of it.

As to the intention, he said, that seemed clearer than the other question. The settlement seemed to have been only with a view, of securing a jointure to the wife. The recital was for that purpose; and the uses limited were agreeable to that intent; there was no consideration had of the children, as against the husband. He was to have the whole power, *only subject to the wife's jointure*; the limitation of the whole was to the wife for her life (except

as therein after excepted) and then comes the proviso, that had been stated. The exception was certainly intended to abridge the wife, *not absolutely* of a moiety, but in the event provided for, of *so much* of the premises (not exceeding a moiety) as the trustees in their discretion should think fit. And according to the true construction of that deed, the eldest son was never intended to have *the whole provision*—The husband foresaw the wife might marry again, and as the whole estate was limited to her in jointure for her life, his children by her might be wholly unprovided for; therefore, this was intended as a provision for the maintenance of all the children, during *the wife's life only*. And the power of redemption in the husband was co-extensive; for if he made a provision for such child or children during his life, the wife was to have the *whole estate*—That the husband was still to have a power over the whole estate, except as to the wife's jointure. He had an estate tail given to him; which by a fine he might convert into a fee simple, and turn the estate into money, and make a provision for his children in that way, if he pleased.

The intention then being clear, the 2d question was, what was the legal operation of the

the deed? It was admitted, it must be either a *springing use*, or a *contingent remainder*; which-ever it was, the consequence was also admitted, if that was once known—That he did not know by what rule of law he could construe that a *springing use*; *springing uses* were introduced to answer the exigencies of mankind, in providing for all the contingencies in their families, in like manner as *executory devises* were allowed of; in order that after a departure with the whole fee, a new limitation of the fee might take place, upon a contingency to arise within a reasonable compass of time, and not within the danger of a perpetuity; not that a fee could be limited upon a fee, but upon the contingency happening, the former uses were to give way. And he did not recollect any case, where a *springing use* had been created in the middle of other uses, but always determined the first limitation of the fee, and displaced the first gift, and changed the uses in favor of other persons. And that it made no difference, whether the whole fee was given away at once, or in particular estates, and by way of remainders—That it was a *certain rule of law*, that if such a construction could be put upon a limitation, as it might take effect by way of remainder, it should never take place as a *springing use* or *executory devise*—That the best construction, he could put upon the limitation

was,

was, *that* of its being a contingent remainder. And that the limitations ought to stand thus, *viz.* to husband for life, remainder as to one moiety to the wife for life, remainder as to the other moiety, to the children during the wife's life, if they are left unprovided for; remainder as to this moiety to the wife for life, remainder of the whole to the heirs of the body of the husband, remainder to the husband and his heirs. Now if this estate was executed, he could give it no other construction, than what a court of law would do; and he was of opinion, it was executed, and not an estate executory, remaining in the trustees. That he must determine according to the *legal operation* of this deed; and as he thought it was a contingent remainder, the consequence was clear, that the fine had destroyed it, and that the plaintiff's bill must be dismissed.

In the last noticed case, we may observe, that the construction of a contingent remainder was immediately let in, by considering the estate introduced by the proviso, as an estate for the life of the wife *actually inserted* in that very place, in the antecedent course of limitations, where the exception in the limitation to the wife left an opening for it; and where it was directed to take effect, upon the contingency expressed in the proviso;

viso; viz. immediately after the estate limited to the use of the husband for his life. In which view, as it regularly followed an antecedent estate of freehold, and operated to divest or determine no vested interest, there was nothing to prevent its taking effect, as a *mesne remainder*, between the husband's estate for life, and the ulterior remainder to him in tail. And the Lord Keeper, resorted to the rule I am now speaking of, as of sufficient energy, to decide the point of view to be adopted, for his decision of the case.

Supra 293.
191.

We may further recollect, that in the several later cases of *Doe v. Holmes* and *Goodtitle v. Billington* considered in a former part of this essay, the same rule was relied upon; in the latter of which, Lord Mansfield in the voice of the court, said it was perfectly clear and settled, *that where an estate can take effect as a remainder, it shall never be construed an executory devise or springing use.*

Doe v. Morgan Supra p.
236. *Barf.*
8 East 763.

And in a still later case, cited in a former part of this essay, where a testator devised lands to his wife for life, remainder to *E.* his son for 99 years, if he should so long live, and after the deceases of the wife and *E.* his son, to the heirs of the body of the said *E.*, but not to descend entirely unto *E.*'s eldest son; but that *E.* might appoint the same to all his children living

living at his death, and in default of appointment, then to his sons as tenants in common in tail, remainder to his daughters, remainder over: the mother died in the life-time of *E.* the son; the question was, whether the devise to the issue of *E.* was good by way of *executory devise*, or was a *contingent remainder*? If the former, the plaintiff in the cause was intitled to recover; but if the latter, it was destroyed on the death of the tenant for life during *E.*'s life, for want of a particular estate to support it.

It was contended on behalf of the plaintiff, that the case was an exception to the rule, that wherever a limitation can take place as a contingent remainder, it shall not take effect as an executory devise; for that rule did not extend to cases like the principal one, where an *intermediate estate* was interposed; but only where the estate limited in contingency, was to take effect *immediately* on the determination of the estate for life; that in those cases the remainders might take place, exactly in the order in which the testator supposed the events would happen; but there the limitation to *E.*'s children could not, as a *remainder*, by possibility take place in the order pointed out by the will. For that limitation was created on a supposition, that the son would survive the mother; but yet, as a *remainder*,
it

it could only have taken place, in the event of the mother's surviving her son. The only way therefore of giving effect to the testator's intention, was, by considering it as an executory devise.

On the other side the general rule was relied upon as inflexible and applicable to the case.—And Lord *Kenyon*, Chief Justice, in delivering the opinion of the court said, if ever there existed a rule respecting executory devises, *which had uniformly prevailed without any exception to the contrary*, it was that which was laid down by Lord *Hale* in the case of *Puresfoy v. Rogers*, *that where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only and not otherwise*. That the rule applied to, and must govern, the case before them. And he cited the case of *Hopkins v. Hopkins* stated in a future page of these sheets, in which case it was expressly decided to be an executory devise, on the ground of the death of the intended tenant for life *in the testator's life time*. That the point therefore had been too long settled to be now over-ruled. And the limitation to the issue of *E.* was accordingly decided to have been a contingent remainder.

Vide infra
419.

From

From the last noticed case, and that of *Hopkins v. Hopkins* therein referred to, it appears, that where the contingent estate may, in the nature of its original limitation take effect *during*, or by the *time of the determination* of, the particular estate (supposing that particular estate to take place) the possibility or probability of its *not doing so*, in the common course of things, or from its relation to other limitations, interposed by the testator, will not take it out of the general rule, that denies the construction of an executory devise, to a limitation, that *may take effect* as a remainder.

But where a future interest without a preceding estate, or a contingent interest unsupported by any preceding freehold, or any estate after a preceding vested fee-simple, is limited by devise; such limitation, as it cannot be good as a remainder, may take effect as an *executory devise*, provided it falls within the limits which the law prescribes, for the validity of such executory estates; of such limits I shall treat hereafter, and in this place only adduce a few instances of the limitations I have mentioned.

Thus, if one devise to the heir of *J. S.* after the death of *J. S.* it is good as an executory devise.—And where *A.* devised lands

Per Cur.
1 Salk. 226.

1 Lut. 798.
Clarke v.
Smith.

to *B.* in fee, to commence and take effect six months after the testator's death, it was a good executory devise; in these cases we observe a preceding estate was wanting.

2 P. W. 28.
Gore v. Gore.
Vide infra,
316.

Hayward v.
Stillington,
infra, 433.

So where testator devised to trustees for 500 years, in trust to pay an annuity to *T.* his eldest son for life, remainder to the eldest son of *T.* (who had no son at the testator's death), it was held good by way of executory devise there being no preceding estate of freehold to support it as a contingent remainder

Fulmerston
v. Steward,
Cro. Jac. 592.
and vide
Wellcome v.
Hammond,
3 Co. 20.
Hinde v.
Lyon, 3
Leon. 64.
Pells v.
Brown,
Cro. Jac. 590.
1 Eq. Abr.
187. c. 4.

We find an early case where a devise to one and his heirs, upon condition he should assure lands in such place to the executors; and, if he failed, then to the executors and their heirs, was deemed to be a good executory devise to the executors.

And afterwards in a case where a testator devised to *B.* his son and his heirs for ever, and if he died without issue *living A.* then *A.* to have those lands to him and his heirs for ever; it was adjudged, that *B.* took a vested fee-simple, and that the limitation over to *A.* was good as an executory devise, to take effect on *B.*'s dying without issue in the life-time of *A.*

Hanbury v.
Cockerill,
1 Roll. Abr.
334.

And again, where a testator devised lands to his son *B.* in fee, and other lands to his son *C.* in fee, subject to a proviso, that if either of his sons should die be-

fore they should be married, or before they should attain the age of 21 years, and without issue of their bodies, then he gave all the lands which he had given to such of his sons that should so die, &c. unto such of his said two sons as should the other survive; it was held that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under the age of 21, without issue.

The three last cases are instances of limitations after a preceding *vested* fee simple.

And even where there is a limitation after a devise in fee simple, though such antecedent devise in fee be *not vested*, but contingent; yet if the ulterior devise is limited so as to take effect in *defeazance* of the estate first devised, on an event *subsequent* to its *becoming vested*, it has been held to operate as an executory devise.

Thus where a testator devised lands to his wife for life, and after her death to such child as she was then supposed to be enſient with, and to the heirs of such child for ever, provided that if such child as should happen to be born, should die before the age of 21 years, leaving no issue of its body, the reversion should go over. The court held it

Gulliver v.
Wickett.
1 Will. 105.
Ant. 395
500.

to be a devise to the wife, remainder to the child in contingency in fee, with a devise over, which they held a good executory devise, as it was to commence within 21 years after a life in being; and that if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife. And that the number of the contingencies were not material, if they were all to happen within a life in being, or a reasonable time after.

Vide 1. Willf.
106.

There is an observation of the reporter on the last noticed case, that the court used a difference of phraseology, viz. *executory* and *remainder*, in respect to the same limitation; from whence it seemed to him uncertain, whether they determined it an executory devise, or a contingent remainder. But I conceive this doubt would have been prevented by his adverting to the language of the court, when they said it was good as an *executory devise*, as it was to commence within 21 years after a life in being; and that the number of contingencies were not material, if they were to happen within a life in being, or a reasonable time after; neither of which circumstances have any sort of relation to a contingent *remainder*, or can be understood as applicable to the idea of it.

Upon

Upon the same case we are further to observe, that although one of the contingencies on which the ulterior devise was construed to depend, viz. there being no child to take as supposed, must have been decided, immediately on the determination of the particular estate without the antecedent limitation in fee ever becoming vested, and therefore such devise would, had it depended on that event only, have been considered as a contingent remainder, equally with the alternative one to the child; yet, the other event, and that indeed on which the limitation over was expressly limited to take effect, viz. the death of the supposed child, under the age of 21 years, could not possibly happen till after the fee simple had actually vested in such child on its birth; in which case it clearly could not operate as a remainder, and therefore must have been void in its creation, if not allowed to enure as an executory devise.

So indeed, where a particular estate of freehold is first devised, capable in its own nature of supporting a remainder, followed by a limitation not immediately connected with or commencing from its expiration; as the latter limitation is incapable of taking effect as a remainder, there seems to be no obstacle to its validity as an executory de-

vise, if confined to the requisite limits of time.

Vide Plowd.
25.
Raym. 144.

Therefore, although in the case of a lease for life to *A.* and that after the death of *A.* and *one day after*, the land shall remain to *B.* for life, it seems that the limitation to *B.* is void as a remainder, because not to take effect immediately upon the determination of the first estate: yet, in the case of a similar limitation by will, there appears to be no ground for denying effect to such ulterior limitation as an executory devise. This conclusion, I conceive, flows from the principle on which lord *Nottingham* proceeded in the duke of *Norfolk's* case, noticed in the sequel of these sheets; which, with the concurrent stream of all the cases and authorities relative to this point, appear to warrant our general conclusion, in respect to the construction of executory devises; that, notwithstanding the will may give a preceding estate of freehold, capable in *its own nature* of supporting a contingent remainder; yet, if an ulterior limitation wants that *connection with, or relation to it*, which is requisite to constitute it a *remainder*, it may take effect as an executory devise, if confined to the limits prescribed by law for estates of that future description.

Infra 353.

Executory

Executory devises have generally been distinguished into three kinds; two relative to *real*, and the third to *personal* estate only. The first sort in this distribution, is, where the devisor departs with his whole fee-simple, but upon some contingency qualifies that disposition, and limits an estate on that contingency; of this the above cited case of *Pells v. Brown* is an instance. So where a testator devised lands to his wife for life, remainder to C. his second son in fee, provided if D. his third son, should within three months after the wife's death pay 500*l.* to C. his executors, &c. then he devised the lands to D. and his heirs; this was an executory devise to D.

1 Salk. 229.

10 Mod. 420.
Marks v.
Marks.

Under the same description we may rank the case of *Gulliver v. Wickett* above cited, and others of the same kind, where, though the fee is not immediately disposed of, yet it is made *defeasible* after a *contingent* disposition of it has *taken effect*.

The second sort of executory devises, under the same general distribution, is, where the devisor gives a future estate to arise upon a contingency, but does not depart with the fee at present; as a devise to the first son or the heir of J. S. when he shall have one; or

1 Salk. 229.

Raym. 83.

a devise to the daughter of *B.* who shall marry such a one within fifteen years.

But it is evident the last description does not properly comprise those cases, where the future estate is *not contingent*, but limited in an event certain; or where, though the testator departs with an immediate estate of freehold, yet the ulterior limitation is not so connected with it, as to be capable of effect as a remainder. To comprehend such cases in the above branches of distribution, the terms of the last description, may be extended, by saying; the second sort of executory devise is, where the devisor, without departing with the immediate fee, gives a future estate to arise either upon a contingency, or at a period certain, unpreceded by, or not having the requisite connection with any immediate freehold, to give it effect as a remainder.

Vide Clarke
v. Smith, supra
302.

Pay's Case,
Cro. Eliz.
878.

The case of a devise to one, to take effect six months after the testator's decease, is an instance of the first class admitted into this extended description. And so where one devised lands to *J. S.* for five years from *Michaelmas* then next ensuing, the remainder to *C.* and his heirs, and died before *Michaelmas*, the limitation to *C.* was held good, although a freehold

freehold cannot be in expectancy; for that in case of a devise, the freehold in the mean time should descend to the heir and vest in him; which reason proves the limitation was allowed to operate as an *executory* devise, though in the report it is inaccurately called a *remainder*.

Again, where one devised lands to his wife, till his son should come to his age of 21 years, and then that his son should have the land to him and his heirs; and if he should die without issue before his said age, then to his daughter, this was held a good executory devise to the daughter. In which case it is observable, that the first devise of the fee was to the son, who was the heir; and therefore, under the doctrine in *Boraston's* case, the son taking the *vested* fee would still have taken by *descent*, and not by the devise, so that the immediate fee must be considered as undisposed of by the will. But if such a devise had been to a stranger, instead of the heir, then under the application of the doctrine I have just alluded to, the case would have fallen properly under the first division of executory devises, where the fee is disposed of in the first instance.

And the case of a limitation to one for life, and from and after the expiration of one day

Palm. 132.
1 Eq. Abr.
188. and
vide Thrust-
out v. Den-
ny, infra,
355.

Supra 167,
168.

day (or any other supposed period, not exceeding 21 years we may suppose) next ensuing his decease, then over to another, may be adduced as an instance of the call, for the latter part of the extent, to which I have opened the second branch of the general distribution of executory devises.

Dyer 74.
pl. 18.
1 Roll. Abr.
610. pl. 4.

The third sort of executory devises, comprising all that relates to chattels, is where a term for years, or any personal estate, is devised (more properly bequeathed) to one for life, or otherwise; and after the decease of the devisee or legatee for life, or some other contingency or period, is given over to somebody else. Such ulterior limitation was void at common law, and the whole property vested in the person to whom it was limited for life; though there was indeed a distinction taken between a devise (or rather bequest) of the *use* of a personal thing, and of the *thing itself*. Thus where the will was, that *A.* should *use* such a thing during his life, and afterwards that *B.* should have it, the limitation over was agreed to be good; but if the first disposition had been of the thing itself to one for life, and after to another, then the devise over would have been void. But the doctrine has gradually obtained, and is now settled, that such limitations over in a *will*, or by way of *trust*, are good.

Brook Devise
pl. 13.
Cro. Car.
346.

Thus

Thus where a testator possessed of a farm, &c. for the term of 50 years, devised his lease of the farm, &c. and all the years therein to come to *B.* after the death of *M.* the testator's wife, &c. and in the mean time his will and meaning was, that his wife should have the *use, occupation of the farm, &c.* during her natural life, &c. It was contended that the devise to *B.* after the death of the testator's wife, was void; for that the devise thereof to her during her life, gave her the whole term. But after repeated debates and arguments on the case, three judges held that *B.* took it not by way of remainder, but by way of *executory devise*. As if the testator had devised, that after his son had paid such a *sum* to his executors, that he should have his term; or that after the death of *A.* that *B.* should have the term; or that after his son should return from beyond seas, or that *A.* should die, that he should have it; in all which cases, and other like, upon the *condition or contingent performed*, the devise was good; and in the *mean time* the testator might dispose of it. And therefore in judgment of law, *ut res magis valeat*, the executory devise should *precede*, and the disposition of the lease, till the contingency happened, should be subsequent; as if the testator had devised, that if his wife died within the term, then *B.* should

Matth. Manning's Case,
8 Rep. 95.

should have the residue of the term, and then further devised it to his wife for her life. And that there was no difference between a devise of the *term* for life, remainder over, and a devise of the *land*, or the *lease or farm*, or *use*, or *occupation*, or *profits* of the land.

In the above case we observe, the court resorted to the grounds of the devise of the term, upon a *contingency or condition* being good, and the ability of the testator to dispose of it in the *mean time*; and considered the devise over, after the death of the wife, as *such a contingency*. The nature of the devise in that case, accorded with this view of its effect, in the circumstance of the devise to *B.* expressly *preceding* the intermediate bequest of the *use* and *occupation* to the wife. But the court, in their general constructive transposition of the life estate, and the limitation over, in considering the latter as a devise on the contingency of the devisee for life dying during the term, and preceding the former as an intermediate disposition till the contingency happened, abstracted from regard to the *particular* circumstances of that case, adopted a rule of construction equally applicable to all cases of a limitation of a term to one for life, and afterwards to another. And accordingly, in a subsequent case, where a testator being possessed of a messuage,

messuage, &c. for a term of 500 years, devised the messuage, &c. to his father for the term of his natural life, and after his decease, the *remainder* to his own sister, and the heir of her body: upon the question, whether the executory devise, after the death, &c. was good, when the *term itself*, and not the *use or occupation of it*, was devised to the first devisee for life, &c. and afterwards to others, it was resolved, that in such case also the executory devise was good.

Lampett's
Case,
10 Rep. 46.

In both the above cases, the devise over was to a person *in esse*, and ascertained. But the principle upon which the decisions proceeded, had no relation at all to that circumstance; and therefore we find the same doctrine holds in cases, where the ulterior devisee is not *in esse*, or not ascertained.

Thus where a termor for years devised the term to his wife for eighteen years, and after to his eldest son for life, and after to the eldest issue male of that son for life; though the son had not any issue male at the time of the devise and death of the testator, yet it was held that if he had had issue male at his death, such issue male should have had it, as an executory devise; for that notwithstanding its being a contingency upon a contingency, and the issue not being *in esse*, at the time of the

Cotton v.
Heath,
1 Roll. Abr.
612.
1 Eq. Abr.
191.

the devise, yet inasmuch as it is limited to the son but *for life*, it was good, and all one with *Manning's case*.

Vide 1 And.
60, 61, and
1 Eq. Abr.
191.

And so if *A.* possessed of a term devises it to *B.* his wife for life, and after her death to his children unpreferred, and after *B.* dies, it has been held that *C.* then being the only daughter of *A.* should have it; for that an executory devise, which hath a dependance on the first devise, may be made to a person uncertain.

The cases I have adduced are sufficient to shew, the *law* to be now settled, that limitations over of chattels real, after a devise to one for life, are good as executory devises.

And that, in *equity*, the like doctrine extends to chattels personal, will be equally evident from the few following cases; in which that species of property was the subject of the limitation on which the question arose.

2 Freem.
137. Cal.
172.

There is an early case of a devise of 500*l.* to the testator's daughter; and if she died before 30 years of age unmarried, then over. She received the money, and died before the time; and it was resolved in equity, that her executor was chargeable as possessed in trust
for

for the legatees over. This indeed was not the case of a devise to one *for life*, or a particular period, and afterwards to another; but a *conditional new disposition* of the property, upon a particular contingency.

But in another case, a testator gave the *use* of all his several paintings, and books of prints, his colours, collection of medals, &c. to his wife, during the *term of her natural life*; and his will was, that if she were with child of a son, that then after her decease the said paintings, &c. should be left, remain, and come to that son; but if she were not with child of a son, or if such son should die without issue male of his body, then all the said paintings, &c. after the decease of his wife, and the death of such son as his wife was then with child of, should come and remain to the use of T. of which his will was, that the said T. should have *the use* only during his life, and that he should leave them to V. his son, &c. T. died in the testator's life-time, and the testator's wife was not with child of a son; and on its being insisted that the limitation of the things to V. was void by the common law. The Lord Keeper, and the judges, were clearly of opinion, that T. dying in the life-time of the testator, and the testator's wife not being with child of a son, the devise to V. was

Vachel v.
Vachel, 1
Chanc. Caf.
129.

an absolute devise, and good in law; and that the widow ought to have the use of the said paintings, &c. during her life. This we see was a limitation to a person upon a *contingency*, after an immediate use *for life* to one, followed by a contingent limitation to another (which, had it taken effect, would have carried the *absolute property*) and also after an alternative limitation for the use of a third person for life. But still this was only a bequest of the *use* of the things for life, &c. and in that respect might be referred to the distinction between a bequest of the *use* of the thing, and of the *thing itself*.

But it was not long after the last cited case, that another occurred, wherein the distinction between the devise of the use, and of the personal thing itself, seems to have met with a considerable degree of modification. It was where a testatrix bequeathed her whole estate, consisting of *personal things*, to her sister C. (who she made executrix) during the term of her natural life; and after her decease her will was, that 400*l.* should be given to the daughters of D. And upon its being insisted that it was a void devise, being the remainder of a *personal thing* after the death of another, to whom the same was given before; the judge to whose opinion it was first referred, and afterwards the Master

Catchmay v.
Nichols, 1
P. W. 6. in
Note.

of the rolls, and ultimately the Lord Keeper, all concurred in opinion, that the said daughters ought to be relieved for the several legacies given them by the will, and for which the said C. was in nature only of a *trustee* to be paid after her death.

And so where the testator gave the Lady T. for life, the castle of T. &c. with the goods and furniture in the castle, &c. and desired that the goods and furniture might be preserved for the heir, &c. and appointed her executrix; it was decreed that she should have the *use* of the goods for her life, and that they should afterwards go over according to the will.

Shirley v.
Ferrers,
1 P. Wm. 6.
in note.

In the last mentioned cases, we may indeed observe, that the legatee for life was the executrix, and as such held to be a *trustee* in respect of the limitation over; and therefore the old distinction, between the *use* of the thing and the *thing itself*, might not be considered, as completely abandoned, on account of her taking the thing itself as *executrix*; and the *use* only constructively as *legatee for life*. But subsequent decisions have removed that distinction intirely.

Thus in a case in 1695, we find it laid down as then *clearly settled*, that
Vol. II. D upon

2 Freem.
206.
Cas. 2^oo.

upon a devise of goods to *A.* for life, with remainder after his decease to *B.*, that it was a good devise to *B.* and that he might exhibit a bill against *A.*, to compel him to give security, that the goods should be forth-coming at his decease; and that it was all one whether *the goods* or the *use of the goods* were devised for life.

Hyde v.
Parratt, 1
P. Wms. 1.

And in another case, which was the subject of considerable debate, where a testator devised his household goods, &c. to his wife for her life, and after her death to *H.* having made *P.* his executor; upon a bill filed by *H.* against the widow and executor, to have an inventory of the goods, and that the widow should give security for their being forth-coming at her death, Lord Keeper *Somers*, after argument, and taking time to consider of it, and on the strength of the late precedents, which had construed the *use* of the thing and not the thing itself to pass, held the devise over to be good.

Since that case, the distinction between the bequest of the *use* of a personal thing, and of the thing *itself* to any one for life, &c. has been completely *laid*, in the constructive operation of such a limited gift, to intitle the restricted legatee, only to the *use* of the thing for the period expressed.

We

We may recollect its having been said, that in case of a bequest of goods to one for life, with remainder over, the legatee for life was compellable in equity, to give security for the goods being forth-coming at his decease; and accordingly in the above cited cases of *Vacbel v. Vacbel*, and *Hyde v. Paratt*, the bills appear to have prayed such security, and this it seems was the old rule of the court. But the later practice is for an inventory to be signed by the devisee for life, &c. to be deposited with the Master for the benefit of all the parties: which Lord *Thurlow* in a late case observed was more equal justice; as there ought to be danger in order to require security.

Vide last cited case but one.

3 P. Ws. 336.
2 Atk. 82.
321.
Vide 1 Br.
Ch. Ca. 279.

Whilst I am speaking of the application of the doctrine of Executory Devises, to chattels personal, as household furniture, &c. it may not be thought digressive from the subject, to notice some circumstances, relative to the degree or quality of the property, acquired by the persons taking the limited or restricted interest for life, &c. in such chattels, under such *testamentary dispositions*, or under limitations of *trusts*, which it seems are analogous in effect.

Marshall v.
Blew.
2 Atk. 217.

It has been held that a devise from a husband to his wife of the use of household goods, furniture, plate, jewels, linen, &c. for life or widowhood, and afterwards to children and grand-children, did not bar the wife of her *paraphernalia*; and that she might under such a devise, use the goods in her *own* or any *other person's house*, alone or promiscuously with other goods, or might let them out to hire.

In the last case, it does not appear that the goods and furniture were annexed as heir looms, to go along, or be enjoyed with any house; such an annexation of them to the possession of any particular dwelling house, might probably, have excluded the liberty of using or letting them to hire, separately, or otherwise than with the house on which the limitation of the goods was so attendant; though I apprehend they might have been let with the house itself.

Cadogan v.
Kennet,
Cowp. 432.

Thus in a case where Lord *Montfort*, upon and in consideration of marriage and a marriage portion, settled his real estate together with his household goods in his house (particularized in a schedule annexed to the settlement,) to trustees for himself for life, remainder

mainder to his intended wife for life, remainder to the sons of the marriage in strict settlement. Lord *M.* after the marriage, continued in possession of the goods; after which, a creditor took the goods in execution upon a judgment; and upon an action of trover brought by the trustees under the marriage settlement; Lord *Mansfield* observed, it was a settlement very common in great families: in wills of great estates, nothing was so frequent as devises of part of the personal estate to go as heir looms; so in marriage settlements, it was very common for libraries and plate to be so settled, and for chattels and leases to go along with the land. If the husband grew extravagant, there never was an idea that these could afterwards be overturned; if that court were to determine they should, the parties would resort to chancery; it was a part of the trust that the goods should continue in the house; and for a very obvious reason, because the furniture of one house would not suit another, and it was the business of the trustees to see the goods were not removed; the creditors had no right to take the goods themselves; the possession of them belonged to the trustees, and the absolute property of them was then

vested in the eldest son, and they were to be kept in the house for his benefit.*

But though it was held that the *possession* of the goods, was connected with that of the house under the trusts; yet it was admitted that Lord *M.* might have let them both together. For Lord *Mansfield* observed, that if Lord *M.* had let his house with the furniture, reserving one rent for the house and another for the furniture; or if the rent could be apportioned, the creditors would be intitled to the rent, though they had no right to take the goods themselves.

Vid. 2 Vez.
10.

There was a further ground of debate in that case, not immediately connected with the doctrine I am treating of, namely, Lord *M.*'s being in debt *at the time of the settlement*, from which it was inferred, that the settlement was fraudulent, and the continuance of possession by Lord *M.* a strong evidence of intention to deceive creditors. But Lord *Mansfield* observed, that the settle-

* There having been a sale of part of the goods in this case, those which had not been sold were ordered to be delivered specifically; and a value was ordered to be put on those which had been sold, to be paid by the creditors who had taken them in execution, and the amount to be vested in government securities upon the trusts of the settlement, the interest to be paid to the said creditors during Lord *M.*'s life.

ment being made (the lady being a ward of the court) under a treaty with the court of chancery, and approved of by the Master, was a *bonâ fide* transaction; and that the possession of Lord M. was not fraudulent; because it was in *pursuance* and *execution* of the *trust*: it was no contrivance to defeat creditors, but meant as a provision for the lady, if she survived, and heir-looms for the eldest son; that although such settlements were frequent, no case had been cited to shew they were *fraudulent*.

How common (said Lord Mansfield) were settlements of chattels and money in the stocks, and could there be a doubt but they were good? Yet the creditors would be intitled to the dividends during the interest of the debtor. That there was clearly no intention to defraud, and there was a good consideration; therefore he was of opinion it could not be left to the jury to find the settlement fraudulent, merely because they were creditors.

And Vide 2 Stra. 947. where a settlement of wife's fortune in trust for husband for life, but if he failed, then for her separate use, was held good.

And where Lord Foley devised certain estates including his house called F. to trustees for a term of 99 years, and subject thereto to his son T. for life, remainder to his first and other sons in strict settlement, with remainders over; and bequeathed "all the

Foley et al. v. Burnell, Cowp. Rep. 435. in note.

standards, fixtures, household goods, implements of household furniture and pictures, gold and silver plate, china, porcelain, &c. which should be in the several capital messuages called *S. W.* and *F.* to be held and enjoyed by the several persons, who from time to time should successively and respectively be intitled to the use and possession of the same houses respectively, as and in the nature of heir-looms, and to be annexed to and go along with such houses respectively for ever." Upon the testator's decease, the trustees, who were also executors of the will, permitted the eldest son and his wife to occupy the house called *F.* (included in the above stated devise) and use the wine, linen and china which was in it at the testator's decease. And upon those articles being taken in execution, at the suit of a creditor of the son, the said trustees and executors, after having demanded them, brought an action of trover, and had a verdict for the amount of the articles so taken in execution.

In the case of Lord *Montfort's* settlement, we are to observe, that the *legal title* to the goods was clearly and indisputably vested in the trustees; consequently they having the legal right to the possession, the *legal* remedy for recovering thereof resided in them. But in the case under Lord *Foley's* will,
it

it seems to be questionable, Whether the *legal estate* in the china or linen resided in the trustees and executors at all, after their assent to the possession thereof by the *cestui que vie*. For unless those articles *legally* vested in them, under the ulterior bequest thereof to *the several persons who from time to time should successively and respectively be intitled to the use and possession of the houses respectively, &c.* the *legal estate* could only vest in them as *executors*; and then it might seem, that their consent to *the possession by the first cestui que vie* as legatee thereof, divested them of the legal estate, and put it in the legatees under that clause, according to their respective interests therein under the will. This observation, at least, applies to the linen and china, however the *executors* might have retained the *legal* title to the wine in *that character*, it not being comprised in the *beir-loom* clause. And as to the linen and china, there seems strong reason to conclude, that if the *legal* remedy had failed, on the ground I have mentioned, the legatees in remainder, might have found an alternative one, in a court of *equity*; according to the arguments and inclination of the Court, in another case under the same will; which in the first stage of it, was the subject of a discussion, relative to the nature of that sort of executory interests, now under consideration.

Lord

Foley v. Bur-
nell, et al.
1 Brown's
Chan. Caf.
274

Lord *Foley*, had by his said will, devised the house called *S.* to *E.* his second son for life, remainder to *E.*'s first and other sons in strict settlement, remainder to *A.* for life, remainder to his first and other sons in strict settlement. The clause I have noticed in the last case, respecting the furniture, plate, &c. after what I have before stated of it as material to the point in that case, proceeded with saying, "That the testator's will and intention was, that one of the services of table plate late belonging to *L. F.* should go to and be enjoyed by the possessor of *W.* and the other by the possessor of *S.* for the time being." The son *E.* was permitted by the executors to take possession of the service of plate at *S.* which he removed to his house in town, where it was taken in execution on a judgment; whereupon a bill was filed by *A.* and his first son (*E.* having then no son) praying that the plate might be restored to the house at *S.* and that *E.* might give an inventory and security for its preservation. It was contended for the plaintiffs, that the property in the plate vested in the executors, but that on their assent the legacy vested in *E.* the first taker for life, and of course was taken out of the executors. That though *E.* had such a vested property, it was qualified; and not such a right as could subject the plate to an execution for his debt; for there were subsequent rights to the

the plate *in specie*: yet they were not such as to intitle their owners to bring actions *at law*. The executors and remainder-man must therefore come into a court of equity for their remedy; which was the proper jurisdiction where parties were intitled to the property *in specie*. On the other hand it was contended, that as *E.* had the use of the goods for life, his creditors were intitled to that use, which was of itself of considerable value, considering the rate of payment for the use of plate.

The Chancellor held, that if the property had been in the trustees, any one, however remotely interested, might have come to that court, to compel them to assert their legal property; but he was at a loss how to make *E.* a trustee, for he seemed to have both the *legal* and *equitable* property. That if an account had been taken, the goods should have been delivered to the first taker, and an inventory would have been taken of them; the use of which would be, that it would make the first taker liable, when the remainder should take place. That the goods were to be held and enjoyed by the persons who should have the houses respectively; one set of plate to go to, and be enjoyed by the possessor of *S.* for the time being. That if the creditors obtained the plate, they must succeed

ceed in applying it, *differently* from the testator's intention. That it was clear, that the creditor of a trustee, taking the goods in execution, would have himself been converted into a trustee. If a trustee had himself the use of a specific chattel during his life, the equitable property would bind the legal. When the executors deliver the chattel, it vests in the taker for life, and the estate of the executor is divested. That here the legal interest was in *E.* and the subsequent interests were legal interests, to be carried *into execution* when they arose. That he might have *let this property together with the house.* And if the court could take it away, it was intitling the persons having the future claims, to take from him the *use* contrary to the testator's intention. That the difficulty arose from hence, that the testator, instead of vesting the property in trustees, had vested it in *E.* subject to the springing uses. That there was a strong principle of justice, for preserving the goods for the benefit of the persons intitled, if the court could so secure them.

Vide infra.

414. et seq.

The Chancellor afterwards dismissed the bill in the above cause upon another point; which I shall have occasion to treat of in a future page of these sheets.

His

His Lordship, in the argument I have been noticing, put the case, of a bequest of a chattel interest to one for life, remainder to another in tail, that the ulterior devisee might come to the court to prevent the *destruction of the subject*. This case we may observe, as well as the common instance, of trustees for preserving contingent remainders, being allowed to obtain an injunction from waste, against tenant for life of the *legal estate*, seems to warrant the interposition of the court, for the benefit of the persons *intitled* after a *temporary antecedent interest* in the first taker, where the *subject* of the property itself is *at stake*; notwithstanding the interest of such first taker, be cloathed with the *legal estate*. Some other cases might be put in support of the same conclusion. But will it not be sufficient for the present purpose, to consider, that executory dispositions of chattels *personal*, appear to have been originally *founded in*, and still *rest on* the doctrine and interposition of a *court of equity*? For if so, where can be the obstacle to that court's interfering in the *regulation* of interests, *created by* and *dependant on its own jurisdiction*?

In chattels *real*, the *law* has long recognized and adopted, the *division* of interests, between the devisee for life, and those in
remain-

remainder; as appears by *Manning's* and *Lampet's* cases before cited. And thence arose a *legal remedy*, for the *specific* subject of the devise, to the persons in remainder, as their executory interests came into possession; wherever the disposition operated on the *legal* estate, without the medium of a trust.

But in respect to chattels *personal*, the *division* of the interest, between the tenant for life, and those to whom they are limited over, seems yet to be a matter of *equitable cognizance*, resting upon the execution of a court of equity *in specie*, at the determination of the prior, and commencement of the ulterior interests. But such a *specific* apportionment and execution of the rights of the parties intitled, would be frustrated, if the court could not secure the *specific chattels themselves*, in the mean time, against the disposition of the first taker, and all claiming through or under him, beyond the extent of his limited interest therein.

It should therefore seem, that the interest of the first taker, may be well considered, liable to the interposition of a court of equity, for preventing his disposition or destruction of the thing itself, and preserving it for the benefit of those intitled after him, according to their respective future interests therein;

in; to which they have as full and *decided a title* under the will, as he has to his immediate preceding interest in the same subject. And as to the objection, of such an interposition, intitling the *future* claimants, to take from the first, the *legal* interest given him by the testator, it may be observed; that to permit him or any claiming through him, to dispose of, or destroy that subject, would be no less a *deviation* from the *testator's intention*, in respect to *those in remainder*, than the court's interposition and restriction of his possessory right, for the preservation of the interests designed for the ulterior legatees, could possibly be, in respect to the usufructuary interest for life *intended him*.

In such cases, if the first taker does not acquire the whole *legal* interest, upon the delivery from the executors, where is the obstacle to considering him as acquiring only a *right to the use or occupation*, according to the limited duration of his interest therein; and that the executor should retain the absolute property in *trust* for him and the legatees over; so as to preserve the right of such ulterior legatees to the possession, when their interests are to commence? Or if the whole *legal* interest be acquired from the executors, on their assent to the possession of the first taker; why may not *be* be considered

sidered as taking it in trust for the ulterior legatees, subject to his own anterior beneficial interest therein? Either of these constructions, would clearly warrant the interposition of the court, even in cases where the disposition was immediate, and unattended with any *express* trust, as that of *Foley v. Burnell*. And we may remember that the above cited cases of *Catchmay v. Nichols*, and *Shirly v. Ferrers*, where the first taker being *executrix* was held in the nature of a *trustee* for the legatees over, and that of *Hyde v. Parratt* where the *use* only and not the *thing* itself, was held to pass when the first devise was for a *limited time*, all avowedly treated the *first taker* in the plain light, of a *cestui que trust* only.

Hoare v.
Parker,
2 Durnford
and East 376.

As the tenant for life of chattels personal, cannot subject them to the demands of creditors, beyond his own life interest therein; so neither can he pawn them, so as to bind those intitled to the ulterior executory interests therein. Thus we find, that in a case where plate was bequeathed to trustees for the use of the testator's wife *durante viduitate*, requiring her to sign an inventory, which she did at the time of the delivery, and she afterwards pawned them to a pawn-broker for a valuable consideration, who had no notice of the settlement; and after her death

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an action of trover was brought by those claiming under the remainder man ; and upon the question, whether the defendant was bound to deliver up the plate, without being paid the money he had advanced on it, the Court said the point was clearly established, and the law must remain as it was, till the Legislature thought fit to provide that the *possession* of such chattels should be proof of ownership.

Et vide
Hartop v.
Hoare,
3 Atk. 44.

In the prosecution of this essay, through the other titles or chapters into which I have divided the consideration of Executory Devises, many instances of the several kinds of executory interests, above noticed, will promiscuously occur for our attention, in a variety of views unconnected with any regard to their specific distinctions or relations ; but what I have said in respect to their specific distinctions and distributive arrangement, will, I apprehend, be sufficient to enable the reader, who may feel occasion or inducement for it, to distinguish and class them as they occur.

General Qualities of executory Devises.

HAVING shewn the distinction between the limitation of a Contingent Remainder, and of an Executory Devise, and given some instances of the several sorts of executory devises; I shall proceed to treat more particularly of the essential difference between the natures of those two estates; and to consider the bounds or restrictions, within which the law confines limitations of the latter description.

(306)

A Contingent Remainder (we have seen) may be limited in conveyances at common law; it relates only to lands, tenements, and hereditaments real or mixed; it requires a freehold to precede and support it, and must vest at furthest at the instant the preceding estate determines.

An executory devise is admitted only in last wills and testaments; it respects *personal* estates as well as *real*; it requires no preceding estate, to support it; and if there be any preceding estate, it is not necessary that the executory devise should vest, when such preceding

ceding estate determines. But these are distinctions in the subjects or modes of such interests rather than in the consequential natures or qualities of the estates, when created.

The great and essential difference between the nature of a Contingent Remainder, and that of an executory devise, (and that indeed which renders it material to distinguish the one from the other in their creation), consists in this; that the first may be barred and destroyed, or prevented from taking effect, by several different means, as I have already shewn: whereas, it is a rule, that an Executory Devise cannot be prevented or destroyed, by any alteration whatsoever in the estate, *out of* which, or *after* which it is limited.

Thus where a man devised lands to his son *T.* and his heirs *in perpetuum*, paying to *R.* 20 *l.* at his age of twenty-one years, and if *T.* should die without issue, *living W.* his brother, then *W.* should have those lands to him and his heirs. *T.* entered and suffered a recovery; and it was adjudged that *T.* took a fee, it being devised to him and his heirs *in perpetuum*, and also paying 20 *l.* to *R.*, both which clauses shewed the intention of a fee to him. And the clause, *if he died without issue*, was not absolute or indefinite when-

Cro. Jac. 590.
Pells v.
Brown,
Palm. 131.
Godb. 282.
(307)

foever he died without issue; but with a contingency, his dying without issue, living *W.* and that the limitation to *W.* was a good executory devise to take effect on the contingency of *T.*'s dying without issue, in the life-time of *W.* For it was agreed it could not be a remainder, because, one fee cannot be in *remainder* after another. And they adjudged that the recovery of *T.* did not bar this executory interest to *W.* because, he who suffered the recovery had a fee, and *W.* had no estate depending upon the estate of *T.* but a collateral and mere possibility, which should not be touched by a recovery. But it is said in that case, if the person to whom the executory devise is limited, come in as ~~as~~ *vouchee*, in a common recovery, that his possibility is thereby given up.

We are to remember, that in the last noticed case the first limitation carried the fee. For we shall find a material distinction between the first limitation being in *fee*, and its being only in *tail*, in regard to the effect of the ulterior contingent devise. In the first case we have seen the limitation over upon a dying without issue living *A.* was good as an *executory devise*; because the whole fee being first limited to a person *in esse*, there was no considering the subsequent limitation as a re-

remainder. But if the first limitation had been in *tail* only, then the subsequent devise might have been considered as a *contingent remainder* depending on that estate-tail; and as limited to take effect, only in case that estate-tail determined in the life of *A.*; that is, in case the first devisee in tail died without issue in *A.*'s life-time.

Thus, where a testator having three sons *J.* and *W.* devised lands to *J.* and the heirs of his body in fee, after the death of *A.* the testator's wife, and if *J.* died living *A.* that *W.* should be his heir; and he devised other lands to his other sons and the heirs of their bodies respectively; and if all his sons should die without heirs of their bodies, then over, &c. *J.* died in the life-time of *A.* leaving a son; and after *A.*'s death *W.* entered, and upon the question whether he was intitled in exclusion of *J.*'s son, the court conceived that, upon the whole contents of the will, the construction ought to be, if *J.* died *without issue, living A.*, then *W.* should have it; and that it should not abridge the former express limitation, nor should *W.* have the lands whilst *J.* had heirs of his body. So that here we observe, that the devise over to *W.* though in strictness of expression limited upon the death of *J.* within a period independent of, the determination

(308)
Spalding v.
Spalding,
Cro. Car.
185.

of the preceding estate-tail, was not considered as enuring in defeasance or abridgment of it; but as serving only to introduce a contingent remainder dependant on the determination of the estate-tail, within that period. Indeed the words be his *heir*, could not be supposed to apply to a brother whilst there was an *heir of the body* living.

I might here also offer, to the reader's attention, the observations afforded by the variance between the construction in the case of *Brownsword v. Edwards*, and some other cases, on a principle of distinction similar to that I have been noticing; which he will find in their more immediate place in the sequel of these sheets.

Vide infra
398-9.

That executory devises or bequests, in *chattels*, are equally secure as in real estates against the disposition of the first devisees or legatees, of the preceding or limited interests therein, appears, in respect to *chattels real* by *Manning* and *Lampet's* cases above noticed; in both of which it was resolved, that after the executor had assented to the first devise, it lies not in the power of the first devisee to bar him, who has the future devise; for he cannot transfer more to another, than he has himself. And the cases of *Cadogan v. Kennet*, *Foley v. Burnell*, and *Hoare v. Parker*, above cited,

Vide 4th resolution in
Manning's case,
8 Co. Rep. 96.
a. And 3d question noticed in
Lampet's case,
10 Co. Rep.
47. b.

cited, evince the existence of the same doctrine, in regard to executory dispositions of personal chattels.

It seems to follow, as a consequence of this exemption of executory interests, from the power of the first devisee or legatee; that, where there is an interest, devised to one for life, &c. out of *a term*; and then an executory devise over of the residue of the term, to another; any subsequent union of the freehold or inheritance, with the interest so given to the *first* devisee, or a feoffment, or other act of forfeiture by such first devisee, will not extinguish or affect the interest of the ulterior devisee; for if it could, the executory interest, might easily be annihilated, without any prejudice to the temporary interest of the first devisee, by collusion betwixt him and the reversioner.

(309)

And therefore we find, that, in a case where *W.* possessed of a house for a term of years, devised the profits thereof to *J.* during the time she should continue sole, and then devised the term to *R.* and died. *J.* entered by assent of the executor, and afterwards purchased the fee. It was resolved, that although the whole term was in *J. quousque*, &c. so that by the purchase of the fee-simple

Hammington
v. Rudyard,
cited in Lam-
pet's case,
10 Rep. 52.

ber interest became extinct; yet the same did not defeat the executory devise to *R.*, but that after the marriage of *J.* and not before, he might enter.

Vide *Lee v. Lee.*
Moor 268.

And so in another case, it was agreed by the whole court, that if *lands* be devised for twenty-one years to *A.* and if he die *within the years*, that *B.* shall have the *residue of the years*; no act of *A.* can prejudice the remainder in *B.*

Vide *Dyer*
253 b
Cro. Eliz.
216—17.
1 *Co. Rep.*
153. b.
Co. Lit. 45. b.

It was indeed said to be *otherwise*, if one *having a term* devised *his term*, with such remainder over; and that the Court agreed, that *there*, by the descent of the inheritance on the first devisee, or unity of possession, or his grant or forfeiture, the remainder would be defeated.—But that distinction was expressly referred to a ground, which no longer exists; namely the strict import of the word *term*, legally comprehending the whole interest therein. For it was said the reason of the diversity was, that when one having a *term* devised his *term*, that was the *whole compleat interest*; by which power was given to the first devisee, over the *whole term*, during a certain time; but that it was not so, where the *land* was devised.—However admissible such distinction might have been, before

before executory devises of *terms*, were established, and whilst, a difference was supposed, between the limitation of the *term itself*, and of the land or *profits*, or *use* or *occupation*, &c. all pretence for it, evidently vanished, in *Manning's* and *Lampet's* cases, above cited; in both of which it was unanimously resolved, that there was no difference between a testator's devising *his term* for life, and his devising the *land*, or his *lease* or *farm*, or the *use* or *occupation* or *profits* of the land. For that in a will, the intent and meaning of the testator was to be observed; and that the law would make construction of his words to satisfy the intent—And it has since been judicially decided, that the word *term*, even in a *demise* by *indenture*, to one for 99 years if she should so long live, and after her death, if she should happen to die within the *said term*, or other end or determination of the *said term*, the *remainder* thereof to another, for and during the *residue of the said term* from thence ensuing and fully to be compleat and ended, meant the *time* or *number of years* viz. 99 years first expressed.

Vide Wright
v. Cartwright
1 Burr. 282.

And in regard to forfeiture, where a testator possessed of a term in lands, devised the
pro-

Cotton v.
Heath,
Pollex. 26.

(310)

profits thereof to his wife for eighteen years, and then that his son *E.* should have the lands for his life, and after his death that his eldest issue-male should have the profits, &c. after the eighteen years expired *E.* entered, had issue a son *R.* and then made a feoffment of the lands; whereupon the reversioner in fee entered for the forfeiture; and upon the question, whether the feoffment and entry for the forfeiture had destroyed the executory devise to *R.*? It was decreed that they had not.

Vide Lam-
pet's case,
10 Co. Rep.
46. b.
Infra 444.

But though the first taker, cannot destroy or disappoint the ulterior executory interest, yet it appears that a release *from* the person *decidedly* intitled to the future executory interest *unto* the first taker, intitled to and in possession of the antecedent limited interest, will discharge that future executory interest; as I shall have occasion to shew, when I come to speak of transferring executory interests.

And though, in general, an executory devise, even of lands of inheritance, cannot be barred by the first taker; yet we are to observe, that where in lands of inheritance an estate-tail is first limited, and then an executory or conditional limitation is made, upon that estate; a recovery suffered by the
tenant

tenant in tail, before the event or condition happens, on which the ulterior limitation was to arise, will bar the estate depending on that event or condition.

Thus in the case of *Page v. Hayward*, where the testator devised to *A.* and the heirs-male of her body, upon condition and provided she intermarried and had issue-male by one surnamed *Searl*, and in default of both conditions, he devised to *E.* in the same manner, &c. *A.* married one whose surname was *Cliff*, and with him levied a fine and suffered a recovery of the lands, in which she and her husband (with another party not material to the present point) were vouched. 1st, It was adjudged by the whole court, that the estate devised to *A.* was a good estate in special tail, that is, to her and the heirs-male of her body begotten by a *Searl*. 2^{dly}, That the words *upon condition*, &c. though express words of condition should be taken to be a limitation; and so the sense was, that if she had no issue by a *Searl* upon her death without such issue, the estate should remain over. 3^{dly}, That her estate did not cease by marrying one that was not a *Searl*, because she might survive her husband and afterwards marry a *Searl*. 4^{thly}, (and which is the point material in this place) that if the estate had been to *A.*,
and

Page v. Hayward,
2 Salk. 570.
Pig. Com.
Rec. 170.

and the heirs of her body by a *Searl* begotten, PROVIDED and upon CONDITION, if she marry any but a *Searl*, that then it should remain and be to *J. S.* and his heirs; a common recovery, suffered before marriage, would bar the estate-tail and remainders; and her subsequent marriage with another would not have avoided the recovery.

Vid. 1 Mod.
111.
Pig. Com.
Rec. 136.

By the same rule, if a gift be to one in tail, determinable on his non-payment of 100*l.* remainder to *B.* in tail; first tenant in tail, before the day of payment, suffers a common recovery, and after fails in payment of the money; yet, because he was tenant in tail when he suffered the recovery, all is barred. So if tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitation.

Gulliver v.
Shuckburgh
Ashby,
4 Burr, 1929.

So where lands were devised to several persons successively in tail, and a clause was inserted by the testator to the effect following, viz. "Provided always, and this devise is expressly upon this condition, that whenever "it shall happen that the said estates shall "descend or come to any of the persons "herein before named, that he or they do "or shall then change their surname, and "take upon them and their heirs the surname
" of

"of *W.* only, and not otherwise." But there was no devise over upon breach of the proviso.

A. the first tenant in tail, two years after his coming to the possession of the estates, suffered a common recovery, in which he was vouched; but he never took upon him the surname of *W.* The person next in remainder entered, for breach of the proviso in *A.*'s not having changed his name. And it was contended in support of his title, that the proviso was a *conditional limitation* and not a *condition*, (for in the latter case none but the heir at law could have title) that the taking the surname of *W.* ought to have been complied with *immediately*; that by the neglect of it, *A.*'s estate ceased by virtue of the conditional limitation, and before the recovery was suffered by him; consequently, the title of entry of the next in remainder commenced before the recovery, and *A.* was not tenant in tail when he suffered it; and that this circumstance distinguished it from the case of *Page v. Hayward*; for there the condition was not broken before the recovery was suffered, but here it was.

(312)

Vide ante
188.

However, the court held, that this was not a conditional limitation, for it was not expressly

(313)

precisely so, the estate not being made to cease or go over upon it; and it was not necessary to effectuate the testator's intention, that such a limitation should be implied: so far from it, that it would totally strip the issue of the tenant in tail, who neglected to change his name; which could never be the testator's intention. That it could not be a condition *precedent*: it could not be complied with instantly. It was to take the name for themselves and their *heirs*; many previous acts were to be done in order to oblige the heirs to take it; as a grant from the King, or an act of parliament; and as a condition subsequent it was nugatory; because tenant in tail might immediately suffer a common recovery and bar the estate; and therefore Judge *Yates* thought it could only operate as a *recommendation* or *desire*. But however, the whole court agreed, that if it were considered as a condition, it was collateral and subsequent, and would be destroyed by the recovery, if not broken before the suffering thereof.

Vide *supra*
185.

In the above case was cited that of *Rudball v. Milward*, which I have stated and made some observations upon, in a former page of this treatise.

And

And in a subsequent case, a testator having devised lands to his daughter *E.* to hold the same, after the death of the testator's wife, to his said daughter and the *heirs of her body* lawfully begotten; and to his daughter *M.* other lands to hold, from and after his wife's decease, to the said *M.* and to the heirs of her body lawfully begotten; and declared his further mind and will to be, that in case either of his said daughters should happen to die single, married, or widow, without leaving children or child *living at their* decease, lawfully begotten, then the *estate* given her by his will, should be *void* as to the *inheritance of heirs*, and of *none effect*, and the lands so given her should go to his heir male and his heirs male, he and they paying to the surviving daughter an annuity during her life—*E.* after the decease of her mother, suffered a common recovery of the lands so devised to her, and afterwards devised them and died unmarried. Upon a question whether the recovery had barred the remainder over; it being contended on behalf of the claimant in remainder, that upon the whole of the will the intention of the testator *was not* to give his daughter an *immediate* estate tail, but an estate *for life* only, with remainder to her children, in tail, if she left any, and if not then to the testator's heir male, &c. but
if

Driver v.
Edgar,
Cowp. Rep.
379.

if not so; still that in providing for the event that had happened, he expressly *revoked* the estate of *inheritance*; the Court said, the validity of the recovery depended on the point, whether the daughter was *tenant in tail*, or tenant for life only, and that it was *necessary* for the plaintiff to support the proposition, that, at the death of the testator, *E.* was during her own life, *tenant for life only*.—That the estate was given to *her and the heirs of her body*, which was an *estate tail*, that if she was *tenant in tail*, to the hour of her death, nothing was so clear as that, *all conditions limited upon such estate tail*, were *avoided* by the common recovery, which had been suffered. And the Court were of opinion, that she was tenant in tail.

Lord *Mansfield* in delivering the opinion of the Court in the last noticed case, cited one, where the testator devised lands to his son *for life*, and to the *heirs male* of his body begotten; and for want of such issue, the said son to have the said estate, *but during his natural life and no longer*, and then the testator's will was, that the lands should descend to his nephew—The son suffered a common recovery, to the use of himself and his heirs, and devised the land, and died without issue male: and it was adjudged

Fountain v.
Gooch,
2 Bac. Abr.
6c.

ed to be an *estate tail* in him; and consequently, that the remainder was barred by the recovery, notwithstanding what was objected, that the gift to the son *during his life* and *no longer*, in case he *had no issue male of his body*, rendered the estate tail contingent (on his having issue male); and that he dying without issue male, it was become, *but* an estate for life *ab initio*.

Upon the two foregoing cases, we are to remark, that the conditional limitation in the one, making void the devised *estate of inheritance*, on the death of the devisee, without leaving a child living at her decease; and that in the other, reducing the estate-tail before given to the devisee to *an estate for life only*, for want of issue male, came too late to avoid the effect of the recoveries, even if we could consider the words of those limitations, as operating literally according to the expression to *defeat* the estates of inheritance before given. For the recoveries, were suffered before the contingencies were decided, on which the estates tail were *to cease*; and consequently whilst the devisee continued *tenant in tail*.

But however the *expression* in cases of this sort may wear the complexion of conditions or conditional limitations, they seem in fact,

not to differ from *remainders*; as they are taken up from an event, which is in itself a *regular determination* of the estate-tail, viz. the death of the tenant in tail without leaving issue then living, so that the express declaration, that the estate-tail shall *cease, determine or become void* in such event, being no more, than what is involved in the very nature of the estate itself, is in strictness perhaps a mere nullity. And the ulterior limitation not operating in any degree to *abridge or interfere* with the ESTATE TAIL, or accelerate its *determination*, may well be considered, as a *remainder*; not *vested* indeed, because confined only to the event of the estate-tail determining by the *decease of the tenant in tail leaving no issue then living*, but *contingent*, on the expiration of the estate tail by *that event*. And this, will, in some measure, account for an observation of the Court in the said case of *Fountain v. Gooch*, that the words "*and for want of such issue the son to have but an estate during his natural life*" was no more than the law implied, for that if tenant in tail, has no issue, it resolves into an estate for life.

(314)
Vide 1 Mod.
111. and
Pig. Com.
Rec. 135.

Here we are to observe, that a common recovery, by tenant in tail, bars all collateral conditions subsequent and limitations; as if a gift be to one in tail determinable on his
non-

non-payment of one hundred pounds, remainder to *B.* in tail; first tenant in tail, before the day of payment, suffers a common recovery, and after fails in payment of the money; yet, because he was tenant in tail when he suffered the recovery, all is barred. So if tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitation.

But a common recovery has this operation only, when suffered by tenant *in tail*. For we have seen that a recovery by tenant *in fee* will not bar an executory estate (*a*), conditional

Vide *supra*,
P. 307.

(*a*) This was a construction in support of executory devises and conditional limitations, and against the force of common recoveries by *strangers* to such interests, arising from the consideration of the utility of the former, in enabling men to make thereby provision for payment of debts, younger children's fortunes, and other necessary family arrangements, by giving over the estate on non-compliance with such imposed conditions; and which construction was favoured by the fictions, upon the ground of which common recoveries were originally supported, none of which furnish a reason for the recovery of a stranger being a bar to this kind of possibilities or future *contingent* interests; for the issue in tail are barred by a common recovery in respect of the recompence in value, which they are

presumed to recover over against the vouchee, on the warranty entered into by him; and the remainder-men and reversioners, and others claiming collateral conditions, rents, statutes and the like, having dependency on such remainders and reversions, expectant upon estates tail, which fall with the estates on which they are dependent, and to which remainders, reversions, &c. the assumed recompence does not extend, are barred on the supposition of law, that the recoveror is in of the estate tail, which by like supposition of law continues for ever, and thereby prevents the remainders and reversions, and the conditions, rents, statutes, &c. dependent thereupon, from ever coming into possession. But the executory devisee is entitled to no part of the recompence which would go to the person having the conditional fee, viz. the first taker of the estate, where a fee is mounted upon a fee preceding, or the heir at law, where the devise is of a fee to commence *in futuro*; and the law takes no notice of the possibility of an estate to arise subsequent to a conditional or determinable fee; because, in contemplation of law, a fee simple, of whatever kind it is, is infinite, and the law expects no end of it, and therefore to this purpose considers the executory estate as a possibility or future expectation of an interest, while it remains executory, and when executed, as a new estate substituted in the room of that to which the recovery in value extended, distinguishable from a remainder or reversion which depends upon a fee tail preceding. And it is on these grounds that, if a writ of entry be brought against a mortgagor, and he vouch the
common

common vouchee, and so a recovery is had, this is no good recovery to bar or bind the mortgagor, but that he may enter after the condition performed. And if one have an estate in fee-simple, determinable upon a limitation or on a condition; as if lands be given to *A.* and his heirs, till *B.* pay to him one hundred pounds, and then that it shall remain to *B.* and his heirs, and *A.* suffers a common recovery and vouches the common vouchee; it seems this is no bar to *B.* and his heirs, but that upon payment of the one hundred pounds, he may have the land. *Shepherd's Pract. Couns.* 206, 207. *Pigott on Recov.* 129—134. So if one give lands to *B.* and his heirs, so long as *C.* shall have heirs of his body, and *B.* doth suffer a common recovery, and vouch the common vouchee, this is no good recovery to bar the donor of the possibility; for in either of these cases he that is to be bound, hath no remainder or reversion, but an interest or possibility, which cannot receive a recompence in value.

But it is said if in these cases the mortgagee vouch to warranty the mortgagor, or *B.* the donee vouch the donor, and so they vouch over the common vouchee, and so the recovery is had, these will be good recoveries to bar both them and their heirs for ever. And so it is said in *Pell and Brown's* case, *supra* 52. "that if the person to whom an executory devise is limited, come in as vouchee in a common recovery, his possibility is thereby given up."

Mr. *Fearne* in the *Essay on Contingent Remainders* fol. 289. seems to consider this as doubtful, because

it is stated in *Pigott* 132. with a *Quere*. But that author, page 134, 135. speaking upon the effect of a recovery "upon a contingent executory estate," says "a common recovery bars not," and he illustrates his position, by the instance of an estate in fee, determinable on a limitation or condition, putting there the cases before mentioned, of lands given to *A.* and to his heirs, until *B.* pays him 100*l.* and then to remain to *B.* and his heirs, and of a writ of *Entry* brought against the mortgagee who suffers a common recovery; and there *Pigott* expressly says "but if the mortgagee vouch the mortgagor, it is good; but it is no bar unless he be vouched;" now if the case of the mortgagee be, as it certainly is, one instance of a contingent executory interest, and if such contingent executory interest be barred by the owner coming in as vouchee, it is difficult to find any reason why it should have that effect in the case of a condition, and not in the case of a limitation, and if it has that effect in the case of a condition and a limitation, then why should it not have that effect in the case of an executory devise?

But it appears to me that there are two indisputable grounds on which a recovery suffered, in which an executory devisee, or person intitled to a contingent executory interest, is vouched, and vouches over the common vouchee, may be supported, and which to me seem unanswerable. First that such vouchee, vouching over the common vouchee, will be intitled to the recovery over in value, for the estate lost; which is the reason of the barring the
issue

issue in tail; and which in contemplation of law, goes according to the estate lost. Secondly the estoppel, for if one be vouched in a recovery, and without demanding the lien or ground on which the tenant founds his warranty, comes in and enters into warranty, none can afterwards say he never warranted; for the tenant cannot say the vouchee never gave him a warranty, because the vouchee has entered into warranty; and the voucher cannot say he never warranted, because his entring into warranty is an estoppel by record, which binds him and his heirs; so none privy to the record can deny it, nor can any stranger gainsay it; because the law will always presume when any one enters into warranty, that there was a warranty by feoffment, or grant of such an estate, as he who is vouched had before. And this is *presumptio juris* and grounded on reason; for being to the vouchee's prejudice, and he binding himself to render the value of the sum in demand, the law will not presume he would thus prejudice himself, unless he had warranted. *Pigott Recov.* 14, 15, 16. And a common recovery disapproves and disaffirms all title of him against whom it is had, and this so strongly that if there be three or four descents cast after the recovery suffered, the recoveror may enter, for the recovery binds the blood and disapproves the title. *ibid.* 18. And therefore it seems to me that as the reason for protecting such executory interests fails, where the owner of it is desirous of parting with it, and as the grounds and reasons on which common recoveries stand, precisely apply to the case of executory devises, and the owners of other executory

Vide *supra*,
P. 307.

tional limitation, or collateral condition, as was decided in the above cited case of *Pells v. Brown*. (a).

interests who come in as vouchees; these reasons together with the general principle, that no further encouragement is to be given to such executory interests, than exactly what is necessary to answer the purposes of their original admission, furnish such strong inducements for supposing that courts will not incline to protect them farther, where that object is attained, that I see little reason to doubt but that by this mode they may be effectually parted with.

(a) Another property belonging to executory devises, or contingent executory estates, and which may be resolved into the same principle, *viz.* their being considered as possibilities or interests to arise in future, is that they are not divested by a feoffment. Thus where one by deed granted several annuities to his younger children, and afterwards devised all his lands to his elder son and his heirs, upon condition that he paid the annuities, and if he failed of payment, that the younger son should enter and have them. The elder son entered and made a feoffment to A., and then the younger son entered for non-payment; and held that his entry was lawful, and that the contingent estate was not divested. *Mullineux's case*, Trin. 42 Eliz. cited *Palmer* 136.

This

This privilege of executory devises, which exempts them from being barred or destroyed is the foundation of an invariable rule with respect to the contingency upon which an estate of this sort is permitted to take effect; which is, that such contingency must happen within a short space of time; such as a life in being or some few years after; otherwise it would be in a testator's power to limit an estate unalienable for generations to come; a power which the law very wisely denies to every man, as the exertion of it would tend to render property in great measure useless to the general purposes and calls of a commercial society. For every executory devise, so far as it goes, creates a perpetuity; that is, an estate unalienable till the contingency be determined one way or another (a).

(315)

Upon this principle, although a devise to *A. and his heirs*, and if he die without an *heir*,

1 Eq. Abr.
186. pl. 1.

(a) The latter proposition seems not to be true, unless confined to strangers, because it seems that the owner of the contingent or conditional fee, together with the executory devisee over may, at any time bar it by a recovery, in which the latter comes in as vouchee, and it may also be departed with by fine, by way of estoppel.

that

Vide 3 Chan.
Ca. 19.

that *B.* shall have it, is not good; because of the remoteness of such contingency, which may not happen for several generations; yet a devise to *A.* and his heirs, and if *J. S.* die, *living A.*, that *B.* shall have it, is good; for this is a contingency confined to the period of a life in being.

Palm. 136.

So where a man devised land to *A.* and his heirs, provided that if he should die *within age*, that then the land should remain to *B.* and his heirs; it was a good executory devise (*a*).

I must observe here, that in respect to estates of freehold, by the *time of vesting*, I mean the time of *vesting of the freehold*; for although land should be limited for a term of 200 years or upwards, with remainder to an unborn son of a person then living, this executory devise to such unborn son would be good; because the vesting of the freehold is

(*a*) And if one devise land to his wife for life, remainder to his son and his heirs, and if he die before his age of twenty-one years, that then it shall remain to *J. S.* in fee, and the son die under twenty-one, *J. S.* shall have the land after the death of the wife. *Mills v. Snowball, Cro. Eliz. 142.*

confined

confined to the period of a life then in being ; (316)
for upon the birth of such son, the freehold
will vest in him, or upon the death of such
person without any son, it must vest some-
where else, (only subject in either case to the
preceding term.)

As where *A.* devised his lands to trustees
for 500 years upon trusts, and after the de-
termination of that term to the first son &c. of *B.* (who had no son born at the testator's
death) this executory devise to the unborn
son of *B.* was held good ; because it was
clear the freehold must vest, either on the
birth of such son, or on *B.*'s death without
having had any son. 2 P. W. 28.
Gore v. Gore.

So where one devised all his lands after
the death of his executor, to *A.* his executor's
son, and his heirs for ever, but if *A.* died
leaving no son, then to that son of his execu-
tor, that he should think fit to give them by
his will ; and for want of a son of his executor,
then to *B.* it was held a good executory devise
to *B.* as confined to the period of a life (*a*)
in being. Prec. Chan.
67. Fairfax
v. Heron.

(*a*) The statement of the case is here varied from
the third edition, but the alteration is from a copy
corrected by Mr. *Fearne*.

In

(317)

Vide 1 Salk.
229.

In all the foregoing instances, we may observe, the contingency was confined to the compass of a life in being; and it is just the same thing if the executory devise be limited to take effect within the compass of several lives in being, for whatever may be the number of such lives, the whole period can amount to no more than the life of the survivor of them.

Loyd v. Carew.
Chanc. Prec.
72. Show.
Parl. Cas.
137. *supra*,
p. 199.

So likewise an executory use to vest within a short time after the period of a life in being, is good. As where lands were limited by marriage settlement to the use of *A.* and his wife, for their lives, remainder to trustees and their heirs during the lives of *A.* and his wife, to preserve contingent remainders; remainder to the first and other sons of the marriage successively in tail-male, remainder to the right heirs of *A.*; with a proviso, that if the heirs of the wife should within twelve months after the death of the survivor of the husband and wife, pay 4000*l.* to the heirs or assigns of the husband, that then the fee should remain to the use of the heirs of the wife: the House of Lords held this executory limitation of the use to the heirs of the wife to be good (*a*).

(*a*) This case is differently stated from what it was in the third edition, but the alteration is pursuant to a copy of Mr. *Fearne's*.

So

So where a testator devised to his wife for life, remainder to C. his second son in fee, provided if D. his third son should, within three months after his wife's death, pay 500 l. to C. his executors, &c. then he devised the same lands to D. and his heirs; it was adjudged a good executory devise to D.

10 Mod. 419.
Marks v.
Marks,
Strange 129.

The limitations in the two last cited cases were confined to vest within a certain number of months, after the end of a life in being. But these are not the utmost limits allowed for executory devises, for the courts have gone so far as to admit of executory devises, limited, to vest within the compass of twenty-one years, after the period of a life in being.

(318)

This was admitted in the case of *Taylor v. Biddal*, where a man having only one sister and heir, who had issue A. and afterwards married B., by whom she had issue C. and D., devised lands to his sister until C. should attain twenty-one, and after C. should have attained that age, to C. and his heirs; and if C. should die before twenty-one, then to the heirs of the body of B. and their heirs, as they should attain their respective ages of twenty-one. Testator died, C. died before twenty-

2 Mod. 289.
1 Eq. Abr.
188. c. 1.
Taylor v.
Biddal.
Freem. 243.

one,

* Vid. 3 Rep.
19. Boraston's
case. Palm.
132. 1 Bur-
row 233. and
infra.
Goodtitle v.
Whitby.

(319)

one, living *B.*, afterwards *B.* died; *D.* (either as heir of *C.* in whom it seems the fee was vested*) or as *heir of the body* of *B.* being of age after the death of *B.* took the estate by way of executory devise. Here we see the heir of the body of *B.* could not take till after the death of *B.* for *nemo est heres viventis*, and since that heir of the body of *B.* who should attain twenty-one, might not have been born before his father's death, and the estate could not vest in him till his age of twenty-one, it is evident the estate might possibly not have vested under that limitation till twenty-one years after the period of a life then in being.

Caf. Temp.
Talb. 228.
Stephens v.
Stephens.

Again, where the testator devised lands to his grandson *W.* and his heirs, and if *W.* should die under age, then to his grandson *T.* and if *T.* should die under age, then to such other son of the body of his daughter *M. S.* by his son-in-law *T. S.* as should happen to attain his age of twenty-one years, remainder over. Testator died leaving two grandsons *W.* and *T.* who both died under age, afterwards another son *A.* of the body of *M. S.* by *T. S.* was born, and it was decreed a good executory devise to this after-born son *A.* if he should attain his age of twenty-one years.

This

This case was decided, it seems, upon the authority of the decision in the above cited case of *Taylor v. Biddal*; it is a very leading case, involving other points than what arise out of the above state of it; for which I shall have occasion to state it more at large in a subsequent part of this essay, where the ground of the decision will appear.

Vide same case *infra*.

In the preceding case, the limitation was not confined to vest in the life-time of *M. S.* or *T. S.* for they might both die leaving a son quite an infant; but it was confined to vest at the infant's age of twenty-one; which must necessarily happen within twenty-one years after the death of its mother *M. S.* who was then in being (a).

(320)

It is the same in regard to personal estate. For where the testator bequeathed the residue of his personal estate to his niece *A.* for life, and after her death the interest to be applied for the maintenance of such children as she should have, until the sons attained twenty-one, and the daughters eighteen years of age, and at such their ages, to be paid their por-

Madox v. Staines.
2 P. W. 421.

(a) *Vid. infra* 409. *Stanley v. Leigh* on the same principle.

tions,

tions, and *for want of such issue*, then to the children of *S.* The niece died without issue, and it was contended that the bequest over to the children of *S.* was too remote; for if the words *for want of such issue* should signify for want of such children of *A.* as should attain the said ages, yet it would exceed the rule which had confined these sort of bequests (especially of mere personal estates) to lives in being. But Lord Chancellor *King* held it to be a good executory devise, and cited the case of *Massenburgh v. Ash*, where the like executory devise of a term for years was held good (a).

Massenburgh v. Ash.
1 Vern. 234.
257. 304.
and infra.
And vide infra *Green v. Ezins.*

(a) So in a modern case where *A.* devised to *B.* his son all his estate until *C.* should attain his age of twenty-two years, and no longer, and afterwards said, *item*, I give and bequeath unto *C.* all my messuages in *H.* and *T.* for ever, that is, if he have a son or sons who shall attain twenty-one, but if my kinsman *C.* shall chance to die without son or sons to inherit, my will is that the son of my son *B.* shall inherit: *C.* took an estate in fee, at twenty-two years of age, subject to be defeated by an executory devise over, which was not confined to vest on the death of *C.* if he left issue, but awaited the event of that issue dying under twenty-one, which could not be decided until a period of twenty-one years after a life in being, *Heath v. Heath.* 1 Bro. Rep. Chan. 148.

So

So where money in the orphan's fund and bank stock was limited by the testator in trust for such of his brother's children then unborn as should attain their ages of twenty-one; it was adjudged a good executory devise (a).

Caf. Temp.
Tal. 245.
Sabbarton v.
Sabbarton.

(321)

More

(a) An estate by way of executory devise may be so limited, as that its taking effect or not may depend upon the act of the owner of the fee, which precedes it: as where *W.* by will devised his estates in *B.* except, &c. to his son *F.* and his heirs, &c. and the rest of his estates to his son *C.* and his heirs, &c. And if either *F.* or *C.* should die without having settled or otherwise disposed the estates so devised, or without leaving issue of his or their respective body or bodies lawfully begotten, or having such issue, such issue should die before his or their age or ages of 21, and without leaving lawful issue, he willed that the premises so given to such of his sons *F.* and *C.* so dying, should go, and he gave the same unto the survivor of them, his heirs, &c. for ever; and if the survivor should die without having settled or otherwise disposed thereof, or of the estates thereby originally devised to him, or, &c. and his son *W.* should then be dead without issue, then he gave such of the said devised premises as should not have been settled or disposed of as afore-said, unto the right heirs of *G.* then deceased, in fee. *F.* died without issue, *C.* by lease release and reco-

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G

very,

More instances of the established limits of executory devises, will be given in the sequel of this essay, in the case of the Duke of *Norfolk* and other cases relating to the limitations of terms and personal estates in tail, &c. only I shall observe in this place, that the law appears to be now settled, that an executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a

very, conveyed part of the estate so limited as above-mentioned to *I. S.* in fee, and then died; after which *W.* died without issue. And the question was, whether under the devise to *C.* and the conveyance by him, *I. S.* took an absolute and indefeazable estate of inheritance in fee-simple. And it was held, first, that on failure of the first limitation, the second might have taken effect, as an executory devise. Secondly, that the testator had in express terms, given one estate to one son and his heirs, and another to another son and his heirs, and if either of them died, without having settled or disposed of his estates, or without issue, then that it should go over; that this was a lawful intention; and that *C.* having settled and disposed of the estate given to him, had thereby defeated the limitation over. *Beachcroft et al v. Broome*, 4 *Durnf. & East's Term Rep.* 440.

life

life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates (a).

And

(a) The case of *Lade Baronet*, against *Holford Esquire et al'* 3 Burr. Rep. 1416. Sir Will. Blackst. Rep. 428, and *Amb.* 479. furnishes strong reason for concluding that any attempt to exceed the bounds mentioned by Mr. *Fearne*, would be resisted. In that case, *L.* by his will devised his manors, &c. to four trustees, and their heirs, and likewise all his leasehold, copyhold, and personal estate, to be laid out in the purchase of land, upon trust, and to the use of his cousin *A.* in strict settlement, with divers remainders over. And a clause was inserted in the will, "that so often as and during such time as "the person who for the time being, (in case the "testator had not otherwise directed,) would have "been intitled in possession as tenant for life, or tenant in tail, should be under the age of twenty six "years, then the trustees were to enter, and receive "all the rents and profits of the real, and all the interest and produce of the personal estate; out "of which they were to allow for the maintenance "of such tenant for life or tenant in tail, sums particularly specified; and all the rent was to accumulate, and be laid out in the purchase of land, and "settled to and upon the same trusts and uses." *A.* married and died leaving a son, who exhibited his bill in Chancery, to be let into the possession of the

Vide supra
p. 109, 317.
Lloyd v.
Carew.

And here we may also remark, that the ground upon which the proviso in the case of *Lloyd v. Carew*, above cited, was admitted to take effect; affords us an inference, that future

estate at the age of twenty-one; and on a hearing before Lord Keeper *Henley*, a case was stated for the opinion of the Court of King's Bench, and thereon the following question put. Whether the heir of the surviving trustee did, upon the birth of *A.* take any and what estate in the devised premises by virtue of the said proviso? And that court certified that they were of opinion that he did not take any estate in the premises devised, by virtue of this proviso. On the part of *A.* it was contended that no estate vested in the trustees, the proviso being void, whether it meant to vest a determinable fee in the trustees, or a mere chattel interest; because in the first case it tended to a perpetuity, by taking away the power of alienation, five years longer than the policy of the law admitted: in the latter case it had the same inconvenience, and was in derogation of the legal powers of tenant in tail. And accordingly the court certified that the heir of the surviving trustee did not take any estate in the premises, under this proviso.

The case of *Phipps versus Kelynge*, before Lord Camden, Monday 20th July, 1767, and which arose in concerning this same case my Case Book vol. 3. p. 61. 1773. the will of the Duke of B. being ^{at length} at length, with the copy of an opinion of the late Mr. ^{Chief Justice} *Burke* on the case of *W. Hill*.

future and shifting uses, and other springing and executory interests, which are not remainders, are to be considered as subject to the

arose on the Dutcheſs of *Buckinghamſhire's* will, furniſhes a further illuſtration of the bounds and limits of ſuch executory diſpoſitions. In that caſe her Grace by her will, gave certain leaſehold eſtates to her ſon in truſt, from time to time, during the term of years therein, to lay out the yearly profits, in the purchaſe of lands of inheritance, and ſettle the ſame to the uſe of *Phipps*, during *his life*, remainder to the uſe of truſtees, to preſerve contingent remainders, remainder to the firſt and other ſons of *Phipps* ſucceſſively, in tail male, with ſeveral remainders over. *Phipps* had a ſon who attained twenty-one years of age. And the queſtion was, to what extent, in point of time, the accumulation, and inveſting the rents, was good? And Lord *Camden* decreed, that the truſt declared by the will of accumulating the rents of the leaſehold eſtates, to be laid out in the purchaſe of lands, to be ſettled as therein directed, ceaſed, and became void on the ſaid ſon attaining twenty one years of age; the law not permitting a leaſehold intereſt to be ſettled, unalienably, beyond the time of the firſt unborn perſon intitled thereto, his or her arriving at the age of 21 years.

same limits and restrictions as executory devises (a).

(a) At the conclusion of this chapter, Mr. *Fearne* has expressed his intention to introduce some cases on limitations, by way of cesser of, and other cases on uses, in addition to those which he has stated in the *Essay on Contingent Remainders*, the last edition, page 412, 413. in furtherance of which intention, I shall submit to the Reader some observations on the limits and restrictions applicable to shifting uses, and other springing and executory interests. Springing, contingent, or secondary uses differ from executory devises, in that there must be a person seised to such uses at the time when the contingency happens, else they never can be executed by the statute; and, therefore, if the estate of the feoffee to such use be destroyed by alienation, or otherwise, before the contingency arises, the use is destroyed for ever, whereas by an executory devise the freehold itself is transferred to the future devisee.

These modifications of property were not admissible in the rigor and simplicity of the common law, there being no rule more clear, than that a freehold cannot commence *in futuro*, and that there can be no remainder limited after a fee simple; but the nature of things, and the necessity of commerce between man and man, at a very early period of history, found a way to pass by that rule, through the medium of uses in equity, or by devise. And though the Legislature afterwards attempted by the statute

of uses to remit the common law, and exclude all possibility of contingent uses, (See *Bacon's Law Treatises* 335, 340.) the various necessities of mankind induced the judges, after the statute, to allow a more minute and complex construction upon conveyances to uses, than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance was made, but that the operation of the statute might wait until a use should arise, provided the suspension was confined to a reasonable period of time.

And such future use may be introduced, as the first use limited, either to vest at a *certain* time, as if, when attornments were in use, *A.* had made a feoffment in fee of a manor, part of which was in lease for years, to hold to the feoffee and his heirs, to the use of the feoffee and his heirs, upon condition, that the feoffee should pay to the feoffor, within ten days 1000*l.* and, if he failed, then, to the use of the feoffor for life, the remainder to the use of his son in tail, and the money had not been paid, and the lessor had attorned within ten days to the feoffee; the same had been a good attornment to raise the secondary uses, *although that* the first uses did not take effect. For the condition is not annexed to the estate of the land, but to the future use only. *Per Dyer, 2 Leon. Rep. 222.* So if one bargain and sell to the use of another *five years hence*, this is a good future use. *Per Holt, C. J. 12 Mod. Rep. 39.* Or such future use may be made to commence on a given event, at an *uncertain time*. As by a feoffment to the use of the right heirs of *J. S.*

after the death of J. S. Per Holt C. J. in the case of *Davis and Speed*, 12 Mod. 39. So where one made a feoffment to the use of feoffees and their heirs, upon condition that, if he did not pay 10,000*l.* within fifteen days to B. or his assigns, then they should stand seised to the use of B. and his wife, remainder to T. their second son in tail, with divers remainders over; the money was not paid, and it was held, that the feoffment was good to pass the contingent use. *Harwell v. Lucas*, *Moore Rep.* 99.

So it was held by all the justices in the 37th and 38th of *Elizabeth*, that where A. made a feoffment to the use of himself and B. his wife, *that should be*, after their marriage, and of the heirs of their bodies, and then A. took B. to wife, that, although the husband was seised in fee in the mean time, as in truth he was, yet by the marriage, the new use should arise and vest, if there were no act in the mean time to destroy the future use, according to the limitation of the use: and judgment was given accordingly. *Woodliffe v. Drury*, 37th and 38th *Eliz. Cro. Eliz.* 439. S. C. 2 *Rolls Abr.* 791. Pl. 35. *et vide Smith* verf. *Warren*, 41 *Eliz. Cro. Eliz.* 688.

In the last case the name of the intended wife was mentioned in the feoffment, and the limitation to her was future, which seems to make a difference. For where M. levied a fine to the use of him and his wife, that he should afterwards happen to marry, by whatever name she should be called, during their lives and the life of the survivor of them, with remainders over; and afterwards he married and
 2 died,

died, and his wife entered on the land; it was held that she took nothing by the feoffment, for that the land was vested in the husband with remainders over. *Mutton's case*, *Anderson* 42. S. C. *Dyer* 274. The reason seems to be, that she was not capable at the time of the limitation; but it was admitted, that if the use had been limited, especially to *M.* until he took a wife, and then to the use of him and his wife for their lives, the same had been a good use to the wife; but it was said that, in the principal case, the use was limited to the wife *in presenti*, and not upon a contingent; and because the wife at the time of the limitation was not capable, she never could take after. *Vid.* S. C. 2 *Leon.* 223. But *Anderson* in his Reports says, *nota*, for much may be said on both sides, &c. See S. C. *Moore* 96.

Again, where *A.* seised of land in fee, covenanted for the advancement of his son, and of his name, blood, and posterity, to stand seised to the use of himself for life, and afterwards to the use of his son, and of such wife as he should marry, and the heirs male of his body; the father died, and afterwards the son took a wife; it was held that the wife in this case had a joint estate with her husband, to them and the heirs male of the body of the husband; that the consideration raised the use to the wife; for without a wife he could not have posterity; and the estate of the son should support the Contingent Remainder to the wife until the marriage, and then the estate of the son should change from an estate tail in him alone, to a joint estate,

estate, by reason of the statute of uses, which vested the possession as the use was, and the use was in this case joint. *Jenk. 8 Cent. Pl. 52. Trin. 5 Jac. Curia Wardorum.*

Estates also may be limited, by way of use to arise upon a use, on a contingency to happen in future, and thereby a fee may be set upon a fee; instances of this kind occur in our books, and were admitted in courts of law soon after the statute of uses; this is proved by Mr. *Fearne*, in his essay on Contingent Remainders, last edition, page 412. from *Bro. Abr. tit. Feoff. al. Uses, Pl. 30.* and the case of *Brimcombe versus Parker*, and other cases cited also by Mr. *Fearne. ibid. 413.*

And in *Boslock's case, Ley. Rep. 56. W. B.* father of *E. B.* grandfather of *R.* being seised in fee of a messuage and mill and other hereditaments in *B.* and *M.* and also of another messuage with a curtilage in *B.* levied a fine of the said hereditaments, with others (except a close called *G. C.*) to the use of *W. B.* for life, and after his decease to the use of *E. B.* and the heirs males of his body, on the body of *M.* his wife begotten, with other remainders over in tail, the remainder to the right heirs of *E.* and for the other messuages and certain lands thereunto belonging, and the said close called *G. C.* before excepted, to the use of *E. B.* for life, remainder to the use of the heirs male of the said *E. B.* on the body of the said *M.* begotten, with other remainders in tail, remainder over in fee to the right heirs of *E. B.*; and if the said *E. B.*
 should

should fortune to die (living the said *M.*) that then the said fine should be of the last mentioned messuage and the lands thereunto belonging, or therewith occupied, and of the said close called *G. C.* to the use of the said *M.* for the term of her life, and after her decease to the uses aforesaid. *E. B.* died, living *M.* and *B. M.* the grandfather. And it was resolved that the estate *M.* was entitled to was an estate for life in the last mentioned messuage.

We may observe in the cases above-mentioned, that the contingencies therein are all limited to take effect within a short space of time, or the compass of a life in being. But no case has as yet expressly fixed the *ultimum quod sit*, as Lord Nottingham calls it, or the utmost limitation of a fee upon a fee; the object, therefore, of our further enquiry on this head, will be, to endeavour to ascertain, as far as may be, by inference, where the courts will stop giving countenance to these modifications of property.

I have been able to find no cases on these future and shifting uses, and other springing and executory interests, particularly applicable to this head of inquiry, except those already mentioned, until that of *Lloyd and Cargaw*, which extended the limits of such uses to a life in being, and one year after; and the resolution in which seems to have been founded on the opinion thrown out on this subject by Lord Nottingham in the Duke of Norfolk's case, which will also be found *infra* page 353, and which opinion his Lordship

ship grounds on the decision in the cases of *Hynde and Lyons*, and *Pells and Brown*, the former of which is reported in 3 *Leonard's Reports* page 64, and the latter of which will be found in this *Essay supra* page 306. and both of which are adjudications upon executory devises. Lord *Nottingham* in his argument on the Duke of *Norfolk's* case, reasoning from the principles which guide contingent and future uses, to those which ought to guide the trusts of terms, fixes no precise boundary to the time at which contingent and future uses and interests may be limited to arise; but he establishes nevertheless a criterion for ascertaining it, founded on sound sense and reason; namely *that the boundary should be there, where any inconvenience appears*; his Lordship says, that wherever there is a tendency to a perpetuity, or any inconvenience, there the courts should stop; and he contended that the cases of *Hynde and Lyons*, and *Pells and Brown* had decided, that there was no tendency to a perpetuity or inconvenience in suspending the vesting of contingent or secondary uses, for as a great length of time as had been permitted in respect of the vesting of an executory devise in these cases. And this reasoning is clearly just, for though there is, as we have seen, a material difference in the manner in which contingent secondary uses and estates take their rise between them and executory devises, yet there can be no difference in respect to their influence on the subject affected by them; there can be no mischief or inconvenience in the postponing the vesting of a contingent secondary use, or shifting or springing trust, to the same period as that

to

to which the law permits the vesting of an executory devise to be postponed. That period which in relation to the vesting of an executory devise has no tendency to a perpetuity, or palpable inconvenience, can have no such tendency in relation to contingent secondary uses, or shifting or springing trusts; and upon these grounds Lord *Nottingham* decided in the case of the Duke of *Norfolk*, that the limitation of a future trust of a term, upon the contingency of the death of a person without issue male, in the life of another person, not leaving his wife enſient with a ſon, was good and valid; be-
cause there was no inconvenience in ſuch ſettle-
ment, no tendency to a perpetuity in ſuch limita-
tion, no rule of law broken by ſuch a convey-
ance; for it could not be ſaid that a limitation
broke any rule of law, unleſs there was a tendency
to a perpetuity, or a palpable inconvenience: and
though, in this caſe, the deciſion was made on the
limitation of the truſt of a term, yet being made ex-
preſſly on the ground, that ſuch limitation of the
truſt of an inheritance would have been good, which
opinion as to the validity of the truſt of an in-
heritance, was founded on the caſe of *Pells* and
Brown as to an executory deviſe, this caſe of the
Duke of *Norfolk's* may be conſidered as an adjudi-
cation in parliament, that there is a complete an-
alogy between executory deviſes, future and ſhifting
uſes, and other ſpringing and executory intereſts
in real and perſonal property, in reſpect of the con-
venience and inconvenience of them in relation to
property; and that therefore they ought all to be
conſtrued

construed upon the same principles, and subject to the same limits and restrictions; and that such future and shifting uses, and other springing and executory interests are good, if so framed as to take effect within the compass of one life in being. The consequence of which will be, that every case on the limits of an executory devise, may be considered as an authority as to the limits of future and shifting uses, and other springing and executory interests; and every case on future and shifting uses and other springing and executory interests, as an authority as to the limits of executory devises.

If we may be allowed to carry the analogy between executory devises and shifting or executory uses, to the length I have suggested it will bear, the cases of *Taylor and Biddle*, and *Stephens and Stephens*, *supra* 318, 319. may be considered as establishing the proposition, that such contingent uses would be good, though not limited to take effect until twenty-one years after the period of a life in being.

One of the purposes to which these future, secondary and shifting uses have been applied, is, where a father seised of two estates, wishes to keep them in distinct branches of his family, and, for that purpose, settles one estate on his eldest son and his issue, and for want of such issue, on his younger sons successively, and their respective issue, and settles the other estate on his second son and his issue, and for want of such issue, on his younger sons respectively,

spectively, and their successive issue. In such case, if the eldest son should die without issue, the estate limited to him would, if nothing more were done, descend to the second son, and he would thereby become possessed of both estates, which would militate against the intention of the father: but here, in order to effectuate the intention, resort is had to a shifting or secondary use, or springing and executory trust, by the interposition of which, the use limited to the second son is, by condition annexed, made to cease, and a new use raised to the third or other son.

The Duke of *Norfolk's* case, to which I have before alluded, and which will be found in the context, is the leading case upon this subject; and though in that case the object is effected by the trust of a term, and not by a use, yet, arguing from the principle, that the criterion in all cases by which we are to judge of the validity of such shifting executory interests, is their tendency or non-tendency to a perpetuity, or palpable inconvenience, that case furnishes the principle upon which all cases of this nature must be decided.

The next adjudication I have met with on this subject, and which regards an estate in fee, is that of *Nicolls* against *Sheffield*, and others. 2 *Bro. Rep. Chan.* 215. which arose on a trust. In this case. *A.* devised all his moiety of the manor of *H.* and all his messuage called *G.* and other estates in the counties of *S.* and *C.* to *C.* and *D.* and their heirs, to the use

use of his daughter *E.* for her life, with remainder to the use of *F.* third son of *E.* for life, remainder to trustees to support Contingent Remainders, remainder to the first and other sons of *F.* successively in tail male, remainder to the use of *G.* (the plaintiff's father) fourth son of *E.* for life, remainder to trustees to support Contingent Remainders, remainder to the first and other sons of *G.* successively in tail male, remainder to *H.* fifth son of *E.* for life, remainder to trustees to support Contingent Remainders, remainder to the first and other sons of the said *H.* successively in tail male, remainder to his own right heirs.

And *B.* by his will, after other devises therein mentioned, devised unto trustees all his freehold estates in the county of *S.* or elsewhere in the kingdom of *Great Britain* (before unbequeathed) upon trust to receive and take the rents and profits thereof to pay debts, &c. in aid of his *O.* estates, if they should not be sufficient; and subject thereto, and to the payment of several annuities, to pay the overplus rents and profits of the said last mentioned estates unto his brother *G.* (the plaintiff's father before-mentioned) for and during the term of sixty years, if he should so long live (subject to the proviso therein-mentioned relating thereto), and from and after the expiration of the said term, or the decease of the said *G.* which should first happen, then he (the testator *B.*) directed that his trustees and their heirs, should stand seised of his said devised messuages, &c. subject and charged as aforesaid, to the

the use of the first son of the body of the said *G.* and the heirs of the body of such first son (subject to the proviso therein after mentioned). And in default of such issue, to the use of the second, third, fourth, and all and every the son and sons of the body of the said *G.* &c. And in default of such issue, then to pay the overplus rents and profits of the said premisses to his brother *H.* for and during the term of fifty years, if he should so long live; (subject to the proviso therein-after-mentioned, relating thereto). And from and after the expiration of that term, or the decease of the said *H.* which should first happen, then he directed that his said trustees should stand seised of his said devised messuages, &c. subject and charged as aforesaid, to the use of the first son of the body of the said *H.* to be begotten, and the heirs of the body of such first son lawfully issuing (subject as aforesaid) and in default of such issue (subject and charged as aforesaid) to the use of the second, third, fourth, and all and every other son and sons of the said *H.* to be begotten, &c. And in default of such issue, then to pay the overplus rents and profits of the said premisses to the testator's brother *R.* for and during the term of fifty years, if he should so long live (subject to the proviso aforesaid,) and from and after the expiration of that term, or the decease of his said brother *R.* which should first happen, then he devised that his trustees should (subject as aforesaid) stand seised of the said devised premisses, to the use of the first, second, third, and fourth sons of the body of the said *R.* begotten or to be begotten, &c. with other remainders over; provided always, and

his express will and meaning was, in case his said brother *H.* or the heirs of his body, or his said brother *R.* or the heirs of his body, should become seised of the estates of which his late grandfather *A.* died seised, either by virtue of or under his will, or by any other ways or means whatsoever, that *then and from* thenceforth, the trusts thereby declared of the last devised messuages, &c. for the use and benefit of such person and persons as *should* so become seised, *should*, from the time of his, her, or their becoming so seised, *cease determine and become absolutely void*; and his (the testator's trustees) and their heirs should immediately afterwards stand seised of his last devised messuages, &c. to and for the *use and benefit of the person or persons next in remainder*, by virtue of that his will, and in such and the like manner as he she or they would be intitled thereto, in case the person or persons, so seised of his grandfather's estates, was or were actually dead, any thing therein contained to the contrary notwithstanding.

The testator *B.* died in 1782, and his trustees thereupon took possession of his estates, paid his debts, and were seised thereof to the use of *H.* for the term of sixty years, if he should so long live.

The testator *A.* the grandfather of the testator *B.* died in 1765, and by virtue of his will *E.* his daughter entered upon the estate devised to her for her life; she died in 1785, and *F.* third son of *E.* the second devisee in the will of *A.* (having died in 1783,) *G.* fourth son of *E.* the father of the plaintiff became entitled for life to the estates devised

by *A.* Upon *G.*'s coming into possession, *W. G.* his son filed his bill, insisting that *G.* being in possession of the estate, devised by *A.* his (*G.*'s) interest in the estate devised by *B.* was determined, and that *W. G.* as being *the next person in remainder* in *B.*'s will was become intitled to that estate. And one question was, whether the proviso for that purpose was good? It was contended on behalf of *G.* that it was illegal, and tended to render the estate unalienable, longer than the rules of law would permit. *Sed per curiam*, there is no doubt with respect to the validity of the proviso; several estates are held under similar limitations. No rule of law is contradicted by it. And if no recovery was suffered, it might take place at any distance of time.

The case of *Heneage and Heneage*, 4 *Term Reports* 13. involves a similar decision on a shifting use. That case arose upon a question reserved for the opinion of the court on an ejectment for lands in the county of *L.* and it was stated, that *T. H.* deceased (the late grandfather of the lessor of the plaintiff in ejectment) by his will dated in 1735, devised the same to his brother *G. H.* and to *W. T.* and their heirs, &c. in trust, as to part of the premises, to the use of his wife *C. H.* for life, remainder to trustees for a term upon certain trusts, which never took effect, and which term had been surrendered by the trustees, remainder as to the part devised to *C. H.* as well as to the parts whereof no use was therein before limited, to the use of his son *G. F. H.* by his first wife for life, remainder to the use of the said *G. H.* and *W. T.* and their heirs

during the life of the said *G. F. H.* in trust to preserve contingent uses, and estates therein after limited; nevertheless to permit the said *G. F. H.* to receive the rents, &c. during his life, remainder to the use of the first and other sons of *G. F. H.* successively in tail male, remainder to the use of the devisor's son *T. H.* by his then wife for life, remainder to the first and other sons of the said *T. H.* (the son) successively in tail male, remainder to the use of the devisor's third, and other sons successively in tail male, remainder to the devisor's right heirs in fee. In which will was contained the following proviso, "provided always and my will is expressly, that in case it shall happen that my son *G. F. H.* or any son or sons of his, to whom the said manors, &c. herein-before-mentioned, are limited as aforesaid, shall ever inherit or take by descent, or by any gift, grant, or devise, or otherwise become seised in possession for his or their life, or lives, or for any greater estate, of the whole or so much of the real estate of my said brother *G. H.*, as shall exceed the yearly value of the estate by this my will limited in use to him and them by 100*l.* by the year, that then, and from such time as my said son *G. F. H.* or any son, or sons of his, shall so inherit or take by descent, gift, grant or devise, or otherwise become seised in possession of such or so much of the said real estate of my said brother *G. H.* as aforesaid, for the term of his or their natural life, or lives, or of any greater estate, all and every the use and uses, limitations and estates, herein-before created and declared of and concerning the said manors, &c. herein before mentioned to, and for, or in favour of my said son *G. F. H.* or any son or sons of his, so coming into possession

session of such and so much of my said brother's estates as aforesaid, shall cease, determine and be utterly void; and in such case my will and meaning is, that the next in remainder, according to the uses of this my will, shall succeed to, and have and enjoy my said estate hereby devised, *as if my said son G. F. H. or any such son or sons of his was or were respectively dead*; any thing herein-before contained to the contrary thereof in any wise notwithstanding."

T. H. (the devisor) died in 1740, leaving the said C. H. since also dead, his widow, and G. F. H. his eldest son and heir at law him surviving; whereupon G. F. H. entered upon the premises limited to him for his life, except such part as was limited to C. H. and on C. H.'s death in 1766, G. F. H. entered upon the residue, and continued in possession till his death in 1782. G. H. (the devisor's brother) who was also seised in fee of several manors, &c. by his will dated in 1751, devised the same to the use of his nephew the said G. F. H. for life, remainder to his first and other sons successively in tail male, with divers remainders over, and with the reversion to his own right heirs; and died in 1753, on which his nephew G. F. H. entered upon the premises devised to him by his uncle's will, and which exceeded the yearly value of the estates above limited to him for life by his father's will by one hundred pounds, and upwards by the year, and continued in possession till 1782, when he died leaving issue of his body the defendant his eldest son and heir, and the lessor of the plaintiff his second son; at the death of G. H. the uncle, G. F. H. had no

General Qualities

son. The defendant was born in *December* 1768, and the lessor of the plaintiff in 1771, *G. F. H.* had also a son named *G. B. H.*, who was born on the 17th day of *March* 1768, and died the 10th day of *May* following, before the birth of the defendant. *T. H.* (the son of the testator *T. H.* named in his will) died unmarried and without issue on the 27th day of *February* 1751, in the life-time of the said *G. H.* and the devisor *T. H.* had no third or other son. The ultimate limitation in the will of the said *T. H.* to his right heirs was vested in *G. F. H.* as heir of his father *T. H.* at the time of the death of the said *G. H.* the uncle. Upon the death of the said *G. F. H.* the defendant, his eldest son, took by devise, and became and was then seised in possession in tail male of the estate of *G. H.* (the brother of the first devisor *T. H.*) under the will of *G. H.* and which estate of *G. H.* exceeded the yearly value of the estate devised by the will of *T. H.* by one hundred pounds by the year, and upwards. Upon the death of *G. F. H.* the defendant entered upon the premises in question, and was then in possession thereof and never had any issue of his body.

No doubt seems to have been entertained in this case, as to the validity of the proviso for shifting the uses on the contingency of the acquisition of an estate of the amount suggested in the will, but the main question agitated was, whether, as the particular estate of *G. F. H.* determined before he had a son capable of taking as next in remainder according to the uses of the will, the subsequent limit-

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ations did not fail for want of an estate to support them? And it was contended for the defendant, that the event which determined the particular estate of *G. F. H.* also determined the subsequent limitations expectant upon it, no person being then *in esse* to take, and that consequently the defendant was entitled as heir at law to the devisor, his grandfather. The limitation to the trustees to preserve Contingent Remainders could not, it was said, vary this case in favour of the plaintiffs, because their right of entry was only for a particular purpose, namely to receive the rents and profits, and to pay them over to *G. F. H.* but on the event of the uncle's death, and *G. F. H.*'s succeeding to his estate, his right to these rents and profits ceased by virtue of the proviso in his father's will; that, if the limitation to the trustees had given them a right of entry for all purposes during *G. F. H.*'s life, or, as in the case of *Nicholls v. Sheffield*, *supra*, a right of entry for the benefit of the person next in remainder, the subsequent remainders might have been supported: But here the devise to them was for a particular purpose only, which purpose was at an end before the birth of a son of *G. F. H.*; for the event of *G. F. H.*'s succeeding to his uncle's estate was to have the same effect as his death. That supposing *G. F. H.* had had a son born before the death of his uncle, such son would have been intitled to take under the express words of the proviso; then if such son would have had a right of entry, the trustees would have none; but if they had any right of entry under the proviso for the benefit of the person next entitled,

such right was inconsistent with the estate before given to them; for the limitation to them was only in trust to receive the rents and pay them to *G. F. H.* and yet under the proviso *G. F. H.* was not intitled to receive them. That if *G. F. H.* had had a son before the uncle's death, that son was to take by the proviso as if the father were dead; but if the trustees had a right to enter, they could only have entered to receive the rents and profits, and for the use of the father; either therefore the trustees could not enter at all, or if they could, their right of entry was (in the event which happened) inconsistent with the trust. That the court by determining in favour of the heir at law, would not defeat the intention of the testator; for that had been frustrated already by the event of the uncle's surviving his nephew, and dying before *G. F. H.* had a son; but if it were even necessary to decide contrary to the devisor's intention, still as he had not guarded against this event, which he might have done by a proviso similar to that in the case of *Nicholls* and *Sheffield*, the heir at law had a right to take advantage of that defect. *Sed per Lord Kenyon C. J.* This is one of those cases on which it is impossible to raise any doubt. The general outline of the will, stripped of technical terms, is this; the devisor who was a younger brother left his estate to his eldest son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, with a proviso, that, if the larger estate should descend from the elder branch of the family to his eldest son, his own estate should go to the younger branch

branch of his family: that event did happen, the uncle's estate descended to the devisor's eldest son. The argument now used (his lordship said) is, that notwithstanding such may have been the devisor's intention, he had not used proper limitations to give effect to it; and the objection is that, the particular estate having been determined before the contingent limitations could take effect, these limitations were defeated, but that objection depended upon the not giving effect to one of the most important limitations in the will, namely that to the trustees to preserve contingent remainders, during the life of *G. F. H.* These are the common words inserted in every limitation of this kind; and there is nothing in this will to induce us to imagine that the devisor intended that the estate limited to the trustees should not continue during the whole natural life of his eldest son; unless therefore the defendant can obliterate these words from the will, or shew that they cannot have any effect, there is an end of his claim; but most unquestionably their estate did continue during the eldest son's life. It is not necessary here to decide who was entitled to the rents and profits after *G. F. H.* succeeded to his uncle's estate and before he had a son born: it is sufficient for the determination of this case that the trustees had a right of entry during the whole of *G. F. H.*'s life, and were to receive the rents and profits for the same purpose. And *Buller* and *Grose* Justices were of the same opinion, *Ashhurst* being absent.

It is observable that in cases of this nature the words
 "the next person in remainder" to whom the estate
 of

of which the use ceases is limited, are construed as denoting the person on whom that estate would devolve by descent or otherwise, on the death of the person then seised or possessed thereof, and not the person described in the instrument to take as next in remainder by purchase.

This was determined in the above mentioned case of *Nichols* against *Sheffield*, the second question in which was, whether *R.* the brother or the son of *H.* the then tenant, was intitled to the estate, the use of which shifted? And the Master of the Rolls was clearly of opinion, that, in the event which had happened, the son of *H.* who was next in descent, and not *R.* the brother, who was next in the limitation, to take by way of remainder, was entitled to an estate tail in possession, in the premises, devised by *B.*'s will, subject to the charges; for the clause only defeated the estate of the person coming into possession of so much of *B.*'s estate as was mentioned in the will, and could not defeat the estate of any one of his (*H.*'s) sons not so coming into possession.

The reader will no doubt have observed, that in the preceding cases of *Nicholls* and *Sheffield*, and *Heneage* and *Heneage*, the events upon which the estates were to shift, were not confined to any particular period of time, as a life in being or twenty-one years after, as in the case of *Loyd* and *Carew*, and other cases before mentioned. This circumstance would have rendered these uses void, had there not been another circumstance in the nature of those cases,

cases, that rendered the effect of the provisos capable of being barred or destroyed within or at the end of twenty-one years after the expiration of the first life ; for the inconvenience of perpetuities, is the reason for confining executory limitations and future uses, to those bounds ; and limitations of the present sort are of that kind, and equally tend to create perpetuities, and are therefore equally to be guarded against and restrained within the very same limits. But the effect of any limitation or proviso in respect to creating a perpetuity ceaseth, where such limitation or proviso is made subject to the power of the person on whose estate it is to operate ; and the moment it becomes capable of being barred or destroyed by him, it can no longer be said to tend to a perpetuity, any more than an estate tail with remainder over does, which estate and the remainders over are capable of being barred by the tenant in tail.

But it is established beyond dispute at this day, that all collateral and conditional limitations, and provisos annexed to an estate tail, may be barred by a common recovery of tenant in tail, suffered before the condition or event happens, in which the proviso or conditional limitation is to take effect. Now the sons in the above cases take estates tail in the lands to which the above provisos are annexed, therefore a recovery suffered by any son, then tenant in tail in possession of these lands, before the access of the estate first limited, would bar and destroy the effect of the provisos, and prevent
the.

the estates from going from the then possessor to the next in remainder, when such accession afterwards happens. And any such son might suffer a recovery immediately after his attaining twenty-one years of age, and even the youngest son, supposing the first taker in such case to be twenty, must attain that age within twenty-one years after the death of his father, whose life was in being at the time when the will takes effect. Consequently, the effect of the proviso in these cases could not continue any longer so in force as to be incapable of being barred, beyond the period of a life in being, and twenty-one years after: because within that period it must be in the power of some person in possession to bar the conditional limitations over, and though he should not use this power, still as he possesses it, the limitation, which is subject to it, is, thenceforth no more a perpetuity, than a remainder after an estate tail is, when the tenant in tail does not act so as to bar it. And therefore such proviso, so long as it continues in force, unbarred by a recovery of any tenant in tail, may operate *toties quoties*, that is, upon every such union of the estate in any persons expressed in the provisos.

Another purpose to which shifting or secondary uses, taking effect by way of cesser may be applied, is, to secure the purchaser of an estate against interruption in the enjoyment of it, or to indemnify him from loss thereby.

And in such case it seems, the benefit of the condition or shifting use will not pass to the assignee of the
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the protected estate, so as to enable him to take advantage of it by entry.

The case of the earl of *Kent* versus *Seward* and *Scott*, *Cro. Car.* 358, furnishes an instance of this sort.

There *F. B.* seised in fee of the manor of *K.* in the county of *N.* and of the manor of *A.* by fine, 41 *Eliz.* conveyed the said two manors to *G.* earl of *S.* and his wife, to the uses following, viz. of the manor of *K.* to the use of them, their heirs and assigns, and of the manor of *A.* to the use of the wife of *J. B.* for her life, and after to the use of the heirs of *F. B.* until *J.* his wife should evict and expel the said earl and countess, their heirs or assigns, their farmers, tenants, or lessees, of or from the manor of *K.* or any parcel thereof, and, after such eviction, then to the use of the said earl and his wife, their heirs and assigns, until they should be satisfied with the profits for their loss. *F. B.* by fine, conveyed the manor of *A.* to *R.* to the use of him his heirs and assigns. The earl of *S.* afterwards by fine conveyed the manor of *K.* to the use of the earl of *K.* and his wife, and their heirs; then *R.* devised the manor of *A.* to *F. W.* and to others for a thousand years, and afterwards died seised of the said manor of *A.* Then *F. B.* died, after whose death, his wife, the said *J.* evicted from the earl of *K.* in dower, parcel of the manor of *K.* and entered. Upon which the earl of *K.* entered into the manor of *A.* upon the assignees of the said term, who re-entered. Whereupon the earl of *K.* brought an action of trespass, and whether his entry was lawful

ful was the question? And after several arguments, it was adjudged for the defendants, that the entry of the earl was not lawful. And the main question was, whether the limitation of the manor of *A.* being to the use of the wife of *F. B.* for her life, and afterwards to the use of the right heirs of *F. B.* until his wife should evict the earl of *S.* and his wife, their heirs and assigns, their farmers or tenants, of or from the manor of *K.* or any part thereof, and then to the use of the said earl of *S.* and his wife, their heirs and assigns, (and he by fine conveying the manor of *K.* to the earl of *K.* and his heirs and assigns) the earl of *K.* as assignee, should take the benefit thereof? And on this point all the justices unanimously resolved, that he, as assignee, might not enter, but that the use upon the eviction, ought first to vest in the earl of *S.* and his heirs; and that this conveyance before the eviction, could not give unto him title of entry as assignee; for the words "heirs and assigns" were to be taken as words of limitation, *viz.* that the earl of *S.* by his entry should have it by limitation, to him, his heirs and assigns; and should not first vest in the assignee as purchaser; and it was not such an interest as was assignable over before eviction. And the power of entry was not transferred with the manor of *K.* *Sed vid. context supra* 194, 195.

But whether the manor of *K.* and the conveyance of the manor of *A.* had destroyed the privity of entry after eviction (the estate being transferred to another before the eviction) they did not deliver any opinion, nor agreed.

Having

Having in this note stated such cases, as have occurred to me upon executory limitations and future uses, limited within periods which have been held sufficiently proximate, not to be open to the objection of tending to perpetuities, and therefore allowed, I shall direct the Reader's attention to the cases with which I have met, in which such executory limitations and future uses have been deemed invalid, as tending to a perpetuity; after which I shall endeavour to shew, from a comparison of the cases of both descriptions, that although no case has yet in express terms defined the exact period beyond which such limitations are inadmissible, yet the result of all the cases is, that it must not exceed a life in being, and twenty-one years and a few months after.

It has been shewn by Mr. *Fearne*, from the case of *Adams and Savage*, 2 *Salkeld* 679, which is cited in the last edition of the Essay on Contingent Remainders, pages 50. 428, that a future use to commence after a limitation of a term to the grantor for ninety-nine years, remainder to trustees for twenty-five years is void. And in the case of *Davis and Speed*, cited also in the same Essay, pages 63. 428. it is held, that a future use, to arise after the death of one without issue, is also void; and the Reader will find a similar decision on a remainder depending upon a general failure of issue, in *Holcroft's* case. *Moore Rep.* 487. In that case the conusees in a fine rendered the estate to the conusor for eighty years then next following, if the conusor so long lived, and, immediately after his decease,

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to the first begotten son of the conusor, which afterwards he should beget, and the heirs male of his body, and so successively to the second and third sons, the remainder to *H.* and his heirs. The conusor had not any son afterwards. And the question on this part of the case was, when the render was to *J.* for eighty years, if he so long lived, and after his decease to his first son, &c. with remainder to *H. in whom* the freehold rested during the life of the conusor, or whether the remainders were void for want of a particular estate to support them? And it was agreed by the Judges, that the remainders were void, because the estate of freehold, during the life of the conusor, did not pass by the render out of the conusees, but the inheritance compleat remained in the conusees; the consequence of which was that the remainder to *H.* if it took effect, would be a remainder to commence after failure of issue of the conusor.

I have not been able, in the course of my researches, to find any other cases on shifting and secondary uses and trusts applicable to the present point in discussion; but if we may be at liberty, and which, for the reasons I have suggested, it appears to me there can be no doubt, we are to reason from cases of devises to those of shifting and secondary uses and trusts, the case of *Lade* and *Helford*, *supra* 83 in note, appears to me to furnish a decisive ground for concluding, that a secondary shifting use or springing trust cannot be limited to take effect at any more distant period than twenty one years and a few months

months after a life in being; because the extending it to any more remote time, takes away the power of alienation for a longer period than the law allows.

The policy of the law, where a man dies leaving an infant son, restrains alienation, until such infant attains twenty-one, and as such infant may not be born until nine or ten months, or perhaps a further period, after the death of its father, the power of alienation is of course suspended during that period; and as the law imposes such suspension of the power of alienation on the infant, so it will permit such suspension by the owner for a like period; for whether it arises from the act of the law or of the party, the effect will be the same in relation to the interest of the public in property, which is what is consulted in the doctrine of perpetuities. To this extent the law goes, and here it stops; therefore every limitation which, in its effect, ties up property beyond that period, tends to a perpetuity; because it takes away the power of alienation for a longer time than the law admits. This seems to be the true ground of the decision in the case of *Lade and Holford*. It is true that the adjudication, in that case, as applied to the facts of the case, determines only that the taking away the power of alienation for a period of five years longer than the policy of the law allows, tends to a perpetuity. But it seems to me it is not the period during which the suspension continues, but the suspension itself of the power of alienation, longer than the policy of the law admits,

which gives the limitation the *character* of tending to a perpetuity, and that the *major* or *minus* is perfectly immaterial. For there seems to me no criterion from whence we can judge, that this or that limitation tends to a perpetuity, but the suspension of the power of alienation longer than the law admits. A limitation may have a greater, or a less tendency to a perpetuity, in proportion as it ties up the alienation of property for a greater or less period of time; but the *point* at which the tendency to a perpetuity begins, is *that* of the suspension of the power of alienation for a longer period than the law admits; for if we speak of a perpetuity in any other relation, except that which it bears to the alienation of property, we have no standard from whence to ascertain its convenience or inconvenience. The case of *Lade* and *Holford* has decided, that the limitation there was bad, because it restrained the alienation of property; the fact was it restrained it for five years, but had the restriction been only for *one* year or one month beyond the limits of a life in being, and an unborn child attaining twenty-one years, it would, I conceive, have restrained the alienation of property for a longer period than the law admits. If we speak of a perpetuity as a measure of time, five years, or fifty years cannot be said to have any tendency to a perpetuity; but if we speak of it in relation to the power the law gives to alienate property, the suspending that power *five days* beyond the period allowed, appears to me sufficient to give a limitation the *character* of tending to a perpetuity; and as Lord *Nottingham* *emphatically* says, in the Duke of *Norfolk's* case, if it *tends* to a perpetuity, there

there needs no more to be said, for the law has so long laboured against perpetuities, that it is an undeniable reason against any settlement, if it can be found to tend to a perpetuity.

The case of *Phipps versus Kelynge*, stated *supra* 83. (note a) furnishes a further illustration of the bounds and limits of such executory dispositions, and appears to me to confirm the principle I have suggested.

Of executory Estates limited upon a failure of heirs or Issue.

(322)

WHEREVER an executory devise is limited to take effect, after a *dying without heirs* or *without issue*, subject to no other restriction, the limitation is void; for the policy of our law will not suffer property to be tied up, and rendered unalienable in expectation of such remote contingencies.

3 Lea 111.

As where lands are devised to *A.* and his *heirs*, and if *A.* die *without heir* then to *B.* this limitation to *B.* is absolutely void.—So where *A.* devised to *J. B.* and his *heirs* for ever, and if *J. B.* should die without any heir, then he devised the estate to *C.*; this limitation to *C.* was held void, because too remote.

3 Atk. 617.
Tilbury v.
Barbut.Moore v.
Parker, 1 d.
Raym. 37.
4 Mod. 316.
Skinner 558.

Again where *A.* having upon the marriage of his son *B.* settled lands upon *B.* for life, remainder to the sons of that marriage successively in tail-male, reversion to *A.* in fee. *A.* afterwards reciting the settlement, devised to the sons of *B.* &c. according to the settlement, and if *B.* should die *without issue*, he charged

charged the land with 4000 l. and gave *B.* a power of making a jointure upon any second wife and then devised to the issues of *B.* by any other wife in tail-male, and in case of failure of *issue male of B.* he devised the lands to his own grandchildren by his daughter *P.* in fee. After *A.*'s death, *B.* suffered a common recovery and died without any issue male. The question was, whether those claiming under the recovery, or the grandchildren of the testator, had the better title?

(323)

Now it is obvious this question depended on two points; first, whether *B.* took an estate-tail by the will? Secondly, if he did not, then whether the limitation over to the grandchildren after failure of issue of *B.* was good? As to the first point, the court agreed that it was impossible to make it an estate-tail in *B.* for nothing was given him by the devise; and that here being two several distinct conveyances the settlement and the will, the devise to the issue, &c. in the will could not be tacked to the estate for life given to *B.* by the settlement, and therefore he had only the estate given him by the settlement. And though it was contended that he took an estate-tail by implication by the words *in case of failure of issue-male of B.* yet this was denied, as no particular estate was given him by the will as

Vide supra.
P. 55.

(324)
Of this vide
infra the
Observations
on the case of
Goodman v.
Goodright.

a ground for implication to work upon; and so he took nothing by the will. As to the second point, that again must have depended on the validity of the limitation to the issue male of *B.* by any second wife; for if that were good, then the subsequent limitation to the grandchildren might also be good, as being to take effect either upon the death of *B.* if he died without having any issue-male by a second wife, or if he should have any, then as a remainder depending upon the estate-tail given to such issue. Now this limitation to the issue-male by any second wife, we are to observe, might be considered as a devise of the testator's reversion expectant on the failure of issue-male of *B.* by his first wife; for such issue-male took estates in tail-male under the settlement, and the reversion expectant thereon was limited to the testator by that settlement: and subsisting vested reversions or remainders, though they wait for a future possession, are present fixed interests, and capable of being disposed of and devised as such.

But here the devise of this reversion to the issue-male of *B.* by another wife, could not be a present disposition, because it was to persons not yet *in esse*. And *Holt* Ch. J. seemed to question whether this immediate devise was
good

good to such issue not being *in esse*. He said, a devise to an infant in *ventre sa mere* is good Vide infra.

as a future devise, but not if it be devised *in presenti*; and that here, if this was a void devise, the devise over to the grandchildren must be void also; for it could not be good as a contingent remainder, because there was no particular estate to support it. And that as (325)

an executory devise it must be void, because

it was to take effect upon the death of *B.* without issue-male. However, I don't find

any decisive opinion delivered respecting the validity of this limitation to the issue-male of Vide infra.

B. by a second wife. For in *Lord Raymond* and in *Skinner* the case *adjournatur*, and in

Mod. it is said, judgment was given, that it was not an estate-tail; so that no resolution at all appears upon the second point.

So where *A.* having the reversion in fee of lands, (which upon the marriage of his son *B.* he had settled on himself for life, remainder to *B.* for 99 years, if he should so long live, remainder to trustees and their heirs during the life of *B.* remainder to the first and other sons of *B.* successively in tail-mail, remainder to the heirs-male of the body of *B.* reversion to *A.* in fee,) devised all the lands mentioned or contained in that settlement, *on failure of issue of the body of B., and for want of heirs-male*

Caf. Temp.
Talb. 262.
Lady Lanef-
borough v.
Fox.

of his own body, to his daughter *F.* and the heirs of her body; and it was adjudged by the House of Lords, that this will did not give an estate-tail by implication to *B.*, and therefore the devise to *F.* was executory and void, as being on too remote a contingency.

(326)

Vid. Walter
v. Drew,
inf. 362, 3.

For we are to observe in this case, that the limitation to the daughter was future, to arise after the failure of issue of the body of *B.*, and of heirs-male of the body of *A.* Now, there was no subsisting estate extending to the issue of the body of *B.* (generally) the settlement being confined to his first and other sons and their issue-male; nor indeed was there any estate-tail in *A.* himself, to extend to the heirs-male of his own body, therefore the estate devised by *A.* could not be considered as the devise of a reversion depending or expectant on such preceding estates.

And though it should be granted, that as *A.* had but *one son*, and there was a limitation by the settlement to the first and other sons of such son in *tail male*, the devise for want of heirs-male of his (*A.*'s) own body, might have been construed as a devise of the reversion expectant on the failure of sons of his
said

said son and heirs-male of their bodies; yet as there was no pre-existing estate extending to issue-female of the body of *B.*, it was impossible to consider the devise on failure of issue (generally) of the body of *B.* as the devise of a reversion expectant on failure of such issue; there being no preceding estate extending to that period; consequently, unless such a preceding estate was raised by implication, which we see was not admitted, the devise to *F.* was not the devise of a reversion, but was an executory limitation unsupported by any preceding estate; and being not to take effect till after a general failure of issue, was therefore too remote (*a*). (327)

(*a*) So upon a case sent to the court of King's Bench, out of the Court of Chancery, where *H.* by will dated 5th *October* 1759, devised to his son *R. H.* an annuity of 50*l.* for his life, to be issuing out of his real estates, and subject thereto, he devised his copyhold estates, (which he had previously surrendered to the use of his will,) and also his freehold estates situated at *S.* and *H.* in the county of *G.* unto trustees and their heirs, to the use of his granddaughter *B. N. H.* without impeachment of waste, remainder to trustees, to preserve contingent remainders, remainder to her first and other sons severally and successively, in tail male, remainder to her daughters as tenants in common in tail general,

I remainder

remainder unto or for the use of such person or persons, and for such estate or estates, as he by any deed or instrument to be executed by him, and attested by two or more credible witnesses, should direct, limit or appoint. The deviser *H.* by a deed poll, dated the 6th of *October* 1759, under his hand and seal, and executed and attested, as in his will mentioned, reciting his will, in pursuance of the power thereby reserved to him, limited and appointed his freehold and copyhold estates "*after the death of his granddaughter B. N. H. and failure of her issue,*" unto and to the use of the first and other sons of his son *R. H.* by any woman he might thereafter marry, (save and except as therein mentioned) severally and successively in tail male, with remainder to the daughters of *R. H.* by such woman, as tenants in common in tail, with remainder in default of such issue, to the use of the right heirs of the survivor of his said trustees, his heirs and assigns for ever. The deviser died leaving *R. H.* his son and heir at law, and *B. N. H.* and all his trustees, him surviving. *B. N. H.* died in the life-time of her father *R. H.* without leaving any issue; all the trustees except *G. S.* died in the life-time of *R. H.* Then *R. H.* died without issue, leaving at the time of his death *G. S.* then living, who thereupon became the survivor of the trustees, to the right heirs of the survivor of whom, and his heirs and assigns the testator's estates were limited and appointed by the instrument of the sixth *October* 1759. And two questions arose, 1st. whether the two instruments above stated, were at the time of the death of the deviser sufficient

cient to pass any estate on interest, in the freehold or copyhold premises, or either of them not given by the first instrument? 2dly. Whether upon the death of *R. H.* any and what estate, or interest in the freehold and copyhold premises, or either of them, passed by virtue of the said two instruments to the said *G. S.* or will at his death pass to such person as shall then be his right heir? And it was held that this instrument of the 6th of *October* was a deed and not a will, and that being a deed, there was no case in which it had ever been decided, that a series of limitations, in part created by one deed, and in part in another, could be consolidated; but the contrary had frequently been determined, and *Moore v. Parker*, and *Goodman v. Goodright*, were cited. *Vid. S. C. infra.* And the court said that where there was a limitation to *A.* for life in one deed, and to his heirs in another, they could not be coupled nor have the same effect, as if both the limitations were contained in the same instrument. Then in this case the limitations created by the will ceased on the death of *B. N. H.* and the limitations created by the latter instrument, whether considered as springing uses or executory devises, were too remote, because they were only to take effect after a general failure of issue of *B. N. H.* And the court certified accordingly. *Vid. Habergham v. Vincent*, 5 *Durnf. and East, Term Rep.* 95, 96. *et S. C. 2 Vez. Jun.* 204. wherein it appears that the second instrument was afterwards proved as a will, *et vid. infra* 363. note (a) *Doe lessee of Fonereau vers. Fonereau.*

But if in this case *B.* had by the settlement been tenant in tail general, the remainder to *A.* in tail-male, with reversion to him in fee, then I apprehend the above devise to his daughter *F.* would have been a good immediate devise of, or rather out of, his own reversion in fee.—For a grant of the reversion when it shall happen after the death of tenant for life, it seems, is construed a good grant of the present reversion, notwithstanding the words seem to be otherwise, and sound futurely. So in a case above cited, where *A.* made a feoffment to the use of himself for life, and after the death *A.* and *M. his wife*, to the use of *B.* &c.; it appearing that *M.* by a former deed had an estate for life; *Hale Ch. J.* held that the mentioning the death of *M.* was only expressing when *B.* should be intitled to the possession.

Vid. 1 Saund.
145-9.
Wade v.
Beale.
3 Mod. Entr.
234, and
cases there
cited.
10 Rep. 107.
3 Cro. 323.
Vide supra,
p. 229.
Weale and
Lower.

1 Salk. 232.
1 Ld. Raym.
523. in the
case of *Badger*
v. Loyd.
And vide
3 Atk. 449.

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And the court agreed in the case of *Badger v. Loyd*, that if a man seised in fee devise his lands to *A. if J. S. a stranger die without issue*, that this is an executory devise; because there is no particular estate to support it; and therefore it is void as being too remote; but that if a man seised of the reversion after an estate-tail, devise the lands to another *after failure of issue of tenant in tail*, it is an immediate devise of the reversion expectant on the estate-tail,

tail, and therefore good. — So in the preceding case of *Lanesborough v. Fox*, as there was no estate-tail in *B.* or in *A.* the devise of lands upon failure of issue of the one, and of heirs-male of the body of the other, was a devise of a future interest not dependent on any preceding estate; whereas if *B.* had been tenant in tail, with remainder to *A.* in tail-male, then would such a devise have been no more than the devise of a present interest, expectant on those estates-tail, capable of being barred, and therefore good.

We have seen that in the case of *Lanesborough v. Fox*, the words *on failure of issue of the body of B.* were not held sufficient to raise him an estate-tail in remainder by implication, he taking no express or particular estate at all by the will; which resolution perfectly agreed with the doctrine in the above cited case of *Moor v. Parker*. And it does not appear by the report, that any idea at all was entertained in the case of *Lanesborough v. Fox*, that these words *on failure of issue of the body of B.* could, by implication, raise estates-tail in remainder to the issue of the body of *B.* as purchasers, so as to support the subsequent limitation to *F.*; and indeed such a construction was denied by the opinion of the Judges when they said,

“ That

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“ That *F.* took no estate whatsoever, but that
 “ the devise to her was absolutely void in its
 “ creation, as being on too remote a contin-
 “ gency ;” for had such an implication been
 admitted, it might have given effect to the
 devise to *F.* However, in a later case in
 Chancery, we find that an implication of a
 nature not very different from this, was con-
 tended for, and endeavoured to be supported;
 and was even expressly admitted by the
 Judges of the King’s Bench, in their certifi-
 cate upon a case stated for their opinion;
 though the Lord Chancellor did not seem to
 approve of or adopt it, but appeared to found
 his decision on another ground.

In Chancery,
 1773.
Jones v.
Morgan.

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The case I am now alluding to, was that of
Jones v. Morgan, where *A.* upon his intermar-
 riage with *B.* had settled certain lands, &c. in
 the counties of *M.* and *G.* upon himself for
 life, remainder to trustees to support contin-
 gent remainders, remainder (subject to a join-
 ture rent-charge to his wife) to his first and
 other sons by the said *B.* successively in tail-
 male, reversion to himself in fee, (subject to
 the several trust terms usually limited in settle-
 ments for securing pin-money and raising por-
 tions for younger children and daughters)
 Afterwards *A.* having two sons of that mar-
 riage *W.* and *E.*, made his will, and after giv-
 ing

ing certain specific things to his said wife and two sons, and making a disposition of certain other lands in the said counties which he had purchased since his marriage, proceeds in the words following, viz. "And forasmuch as it
" is my will, intent and meaning, that in case
" my said two sons now living, or *any other*
" *son or sons of mine lawfully begotten* hereafter
" to be born, should die without issue male of
" their bodies, or of the body of some or one
" of them lawfully to be begotten, after their
" respective decease without issue-male as
" aforesaid, that then all and singular my messuages, lands, &c. in the several counties of
" M. and G. not herein before devised, shall
" be devised and settled to and for the several
" uses, &c. herein after-mentioned, &c. It is
" therefore my will, intent and meaning, that
" in case my said sons W. and E. or *any other*
" *son or sons of mine* hereafter to be born as
" aforesaid, shall happen to die respectively
" without any issue-male of their bodies, or of
" the body of some or one of them as aforesaid,
" and in such case if it shall so happen, then
" I give and devise the remainder of all and
" singular my messuages, lands, &c. in the
" several counties of M. and G. and not herein
" and hereby before devised, and the reversion
" and reversions, remainder and remainders of
" the same premisses to my (said) brother T.
" for

“for and during the term of his natural life,
 “without impeachment of waste, but subject
 “nevertheless to the several provisoes and
 “payments mentioned and contained in my
 “said marriage-settlement, &c.”

And then the testator limits the same lands to trustees during the life of T. to preserve contingent remainders, remainder to T. M. son of T. during his life, remainder to trustees to support contingent remainders, remainder to the first and other sons of T. M. with divers remainders over; and he appointed his wife one of five guardians of such of his (the testator's) children as should be under age at the time of his death, and also one of the executors of his will.

The testator died, leaving his said wife B. and his said two sons and two daughters by her. And one of the questions upon this will was, Whether the said residuary devise over to T. and his son, &c. was not void, as being a future limitation not to take effect till after the failure of issue of persons who took no preceding estate, namely, of all other sons of A. by any future wife; for this limitation to T. &c. was not expressed to take effect upon failure of issue male of the testator's sons by his then wife; in which case it would have been good,

good, as an immediate devise of the reversion expectant on the estates in tail-male limited to such sons by the settlement; but the words were general and comprehensive, extending, in point of expression, as well to the future sons of the testator by any after-taken wife as by his then wife; and if so, this limitation could not be a devise of the reversion immediately expectant on the estates subsisting or created by the settlement, but was a future devise without any preceding estate to support it; and then as it could not take effect as a remainder, it could be considered only as an executory devise; in which light it must be void, for it was too remote, as being limited to vest on a general failure of issue.

In support of the devise, it was contended, that the testator had not a future marriage in view, or any children not provided for by his settlement; that this appeared from his giving some specific legacies to his wife, naming her one of his executors and one of the guardians of his children. Therefore the words *or any other son or sons*, &c. were to be understood as confined to sons by his then wife; and under that construction, the limitation in question would be good as an immediate devise of the reversion, subject to the estates created by the settlement. Or that if those

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words did extend to children by a *future* marriage, still the limitation in question might be supported by *raising implied estates-tail* to such children.

Upon a case stated for the Judges of the King's Bench upon this devise, they certified, "That they were of opinion, that the event
"of a second marriage was not in the testator's
"contemplation; but supposing that from
"the generality of the description the words
"any after-born *son*, should be extended to
"the son of any future marriage; they were
"of opinion, that from the manifest intent of
"the testator expressly declared in his will,
"such son must take an estate-tail; consequently they were of opinion that either
"way a remainder after estates-tail was devised to T. who by virtue of the said limitation, upon failure of the sons of the testator without issue-male, was entitled to all
"the lands in the counties of M. and G. devised by the residuary clause in the said will
"for life, with remainder according to the
"limitations in the said will."

The Lord Chancellor decreed accordingly: He concurred entirely with the opinion certified by the Judges, in regard to the event of a future marriage not being in the testator's

tator's contemplation, and consequently that the words *or any other son or sons* were to be restrained to sons of the first marriage. But as to the raising an estate-tail to any sons of a future marriage by *implication*, he expressed himself inclined to the opinion, that he was bound by the decision of the House of Lords in the case of *Laneborough v. Fox*, as a direct authority against the admitting *such implication*.

Upon an appeal to the House of Lords from this decree, it was affirmed agreeable to the unanimous opinion of the Judges; founded (as appeared by what was expressed by the Chief Justice of C. P. in delivering their opinion) upon the very same ground to which the Lord Chancellor seemed to think himself confined, *viz.* upon the presumption that the event of a future marriage was not in the testator's contemplation; and that therefore the words *or if any other son or sons*, &c. must be understood of sons of the testator by his *then* wife.

Again, where tenant for life, remainder to his wife for life, remainder to his own right heirs, devised in manner following: "*Item, My lands at W. my wife is to enjoy for her life, after her decease of right it goeth to*" (335)

K 2

" my

Wright v.
Hammond.
1 Stra. 427.
2 Eq. Abr.
358. pl. 11.
Vin. vol. 8.
p. 110. pl.
32.

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Vide infra
359.
Read v.
Snell.

“ my daughter *E.* for ever, provided she hath
“ heirs; if my said daughter *E.* should die be-
“ fore her mother, *or* without heirs, and my
“ said wife should marry again and have an
“ heir-male, I bequeath him all my right to
“ that estate; not thinking I can sufficiently
“ reward her love: if my said wife marrieth
“ again and fails of heir-male, after her de-
“ cease and my daughter’s, she failing of heirs,
“ I bequeath 50*l.* *per annum* of that estate to
“ my brother *J.* and his heirs for ever.” The
testator died, the wife married again, and had
issue-male, afterward the daughter died with-
out issue. Upon a question whether the heir
at law of the deviser, or the heir-male of the
wife was entitled to the estate? The court held
the former part of the will to be no devise,
but only a declaration how the estates were
settled; and therefore there being no particu-
lar estate to support the limitation to the
heirs-male of the wife, it could not enure as
a contingent remainder; if it were an exe-
cutory devise, it must either be to take effect
on the daughter’s dying before her mother,
and without heirs (by taking the word *or* for
and, and so construing it copulatively) in
which case the condition had not happened,
because the daughter survived the mother;
or else it was to take effect in either of the
events of the daughter’s dying before the mo-
ther,

ther, or her dying without heirs : now one of these events had failed, because the daughter survived the mother, and the limitation upon the other, viz. of the daughter's dying without heirs, was too remote.

So where *A.* upon the marriage of her niece *B.* covenanted to settle lands (at or after such time as *C.* the husband of her niece should settle his estate to the same uses) to the use of herself for life, remainder to trustees for 200 years, remainder to *C.* for life, remainder to trustees to preserve contingent uses, remainder to *B.* for life, remainder to the first and other sons of *C.* upon the body of *B.* in tail successively, remainder to the first and other daughters of *C.* upon the body of *B.* in tail successively, remainder to the right heirs of *A.* Afterwards, and before any settlement was made, *A.* by her will reciting the articles, and that she had agreed to settle the lands in manner aforesaid, devised the said lands, &c. and the *absolute inheritance* thereof, to the use and behoof of *the heirs of the body* of the said *B.* by any other husband to be begotten, and for want of such issue, to the use of her nephew *L.* and the heirs of his body, with several remainders over; remainder to her own right heirs. *A.* died seised; *C.* and *B.* his wife entered and

2 Burr. 873.
Goodman v.
Goodright.

(337) suffered a common recovery, in which they were vouched ; the uses of the recovery were to C. for life, remainder to B. for life, remainder to trustees to support contingent remainders, remainder to first and other sons of C. and B. successively in tail-male, remainder to the daughters in like manner, remainder to the uses to be jointly appointed by C. and his wife, remainder to the right heirs of B. B. died without issue, afterwards C. died ; and the question was betwixt the heir at law of B. and the daughter of L.

The points upon which this question depended were; 1st, Whether the will was to be taken as an execution of the articles? 2^{dly}, If not, whether the estate to the *heirs of the body of B.* by another husband should be tacked to the estate given her by the articles? 3^{dly}, Whether the devise to the *heirs of the body of B.* by any other husband was not absolutely void, being a devise in *verbis de presenti* to a person not *in esse*; and if so, whether L. did not take immediately, as much as if there had been no preceding devise; or at least, whether the preceding devise to the heirs of the body of B. by any other husband, ought not to be laid out of the case, having become void in event, since the

the event of her having issue by any other husband never happened?

After this case had been very fully argued, the court resolved, that if the will should be taken as an execution of the articles, and as an actual devise of the particular estates, according to the limitations contained in the articles, then the subsequent limitation to the heirs of the body of *B.* by a second husband, would vest in her as an estate-tail, (in remainder) and consequently the recovery suffered by her and her husband had barred the subsequent limitation to *L.* But that it was unnecessary to enter into the question, whether the articles and the will could be *tacked together*; because if a devise of the particular estates expressed in the articles, could not be implied by construction, and *supposing the devise to the heirs of the body of B. by a second husband to be void*, the limitation to *L.* and the heirs of his body could not be a contingent remainder (for want of a preceding estate). And it was too remote as an executory devise; being not to take place till after an indefinite failure of issue of the body of *B.*; and being too remote in its creation, the event could not vary the construction: so that the death of *B.* without issue, could make no difference in the case. Therefore

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either way, *L.* could have no title, unless it were considered as *a present immediate devise* to him. But the court held that neither the words nor the nature of the provision would admit of that construction: and that it could not be imagined that *A.* intended to exclude the issue of her favourite niece *B.* in order to prefer *L.* and his issue (*a*),

I observe

(*a*) Here we are to distinguish between an executory devise, which is properly a future devise to take effect at a period subsequent to the decease of the testator; and a conditional devise to take effect upon a contingent event, to be decided at or before his death. *Fearne MSS. et vide Dougl.* 495.

The case of *French et al* verf. *Cadell et al*, 6 *Bro. Ca. Parl.* was decided on this ground.

In that case *A.* seised of divers estates in several counties of *G. R.* and *S.* in *Ireland*, by virtue of a settlement made by his mother, to the use of himself for life, with remainder in strict settlement, with a remainder in fee-simple, vested in himself as right heir of his mother, made his will, in manner following, reciting that he had, by his marriage settlement, settled a jointure of 400*l.* a year upon his wife, and being desirous to make a better provision

vision for her, he thereby devised to her all the fortune he was entitled to in her right, provided she should be content and satisfied therewith, and with 200 l. a year out of his real estate, during her life; "*and upon default of issue male and female of his own body,*" he devised all his estate in the counties of G. R. and S. to trustees, in trust in the first place, *to pay all his just debts and legacies,* and after payment thereof, and securing the provision made for his life, he limited his estates in the counties of G. and S. to the use of his brother K. for life, remainder to his first and other sons in strict settlement, with divers remainders over: and as to his estates in the county of R. *upon default of issue of his body, and after payment of his debts and legacies,* he devised the same to his nephew G. for life, remainder to his first and other sons in strict settlement, with divers remainders over. And he thereby bequeathed *annuities* to his *sisters*, and some *small legacies* to his *nieces* and other *nephews*, and devised his real estate, *in default of issue,* to his daughters successively, and the heirs of their bodies; and if there should be any younger daughter or daughters, who should live to marry, to have such portions on the estate as the trustees and their heirs should appoint. And by a codicil, after making some alterations with regard to the life annuities, and legacies bequeathed by his will, he revoked the bequest of the money and securities that he had, or was intitled to, as his wife's portion, and bequeathed the same to the appellants and their heirs, to be laid out in lands, in trust for his grand nephew K. with such remainders as were limited of his estates in the counties of G. and

and S. The case arose on an appeal from a decree in favour of the devisees, by the Lord Chancellor of *Ireland*, and the question, material to the present subject in consideration was, as to the validity of the devise of the lands in the counties of G. R. and S. It was contended on one side, that the devise of them was void, for want of a particular estate to support it as a remainder, and too remote, after a general failure of issue, to take place as a future or executory devise. On the other side it was argued that the devise to the remainder men, under the will of R. was, at his death, a devise in possession, and not an executory devise. No estate was limited to the issue by the will; but it was plain he meant a failure of issue, *living at the time of his death*. The contingency was determined the instant the will took place, *viz.* at his death. The first trust was to pay debts, legacies and annuities to his sisters for their lives; and he could not have intended that those trusts should take place, one hundred or two hundred years after his death. The legacy given by the codicil to J. C. of which the first payment was to be made on the 1st of *May* or *November*, which should first happen *after his death*, shewed what he meant by dying without issue, *viz.* if he should have no issue, *when his will should take effect*. And the codicil was expressed to be an addition to the will, and directed, that the will should stand in all points not thereby altered; and therefore the legacies were, by the will and codicil, payable only on the event of his dying without *leaving issue* at his death. And by this construction, none of those

those dangers could arise, which prevent the effect of executory devises; nor was any rule of law broken. And the appeal was dismissed, and the decree therein complained of, confirmed.

So in the case of *Wellington v. Wellington*, which arose on a devise to the effect following, viz. "*item in DEFAULT of issue of my own body, I give, devise and bequeath, &c.*" and so gives all his estates in several counties unto trustees and their heirs, in trust to pay out of the rents, issues and profits unto the testator's sister, an annuity during such time, and until all his just debts, funeral expences, and legacies (other than annuities) should be fully paid and satisfied, and also other annuities and several legacies. Then the testator willed that, immediately from and after such time as all his just debts, funeral expences, and the legacies given by his will, (other than annuities) should be fully paid and satisfied by his said trustees, from and out of the rents and profits of his said estates; and subject to the annuities before given, he gave and devised all his estates, as in the will is mentioned. A question was sent out of the Court of Chancery, for the opinion of the court of King's Bench: whether the trustees in the will took *any*, and *what* estate under the said will? It was argued, on the part of the plaintiff that they took a *base* fee determinable upon the payment of the debts, legacies, and annuities; that the default of issue of his body was only a condition precedent. The testator was a batchelor; his will was to take no effect, if
he

he married and had children. That this devise being conditional, the court would support the intention of the testator. That the expression "in default of issue of my own body," differed from saying "on failure of issue of my own body"; the latter expression supposed that issue would exist; the former did not. That it was consistent with the event of such issue never existing, as well as of their dying in his life-time. That was not too remote for an executory devise. It was to take no effect, if the testator should have children at his death. He had only expressed what the law would have implied. *E contra*, it was contended on behalf of the defendants, that the words, "in default of issue of my own body" meant an indefinite failure of issue, and was, therefore too remote in point of law. That though the testator was a bachelor, and might think it probable that he should remain so, and therefore, in that event, might mean his devisee over to take, yet, the same intention for them to take was as probable, in case a different event had happened, namely, that of his marrying and having issue, and that issue afterwards failing; both dispositions were equally reasonable, and proper, and might (for ought, that he knew to the contrary) be equally legal. That the testator did not mean to give his trustees a base fee. He only meant to give them an estate "*on failure of his own issue*" whenever they should become extinct. Then, and not till then, his devisees over were to take. But that was a period too remote for supporting it as an executory devise. That there was

I observe in the report of the above case, the court delivered no express decisive opinion, as to the validity of the limitation to *the heirs of the body* of *B.* by any other husband, taken as a future devise; but it must be inferred from the judgment, when compared with the words of Lord *Mansfield*, that the court were inclined to avoid admitting the validity of that limitation; for Lord *Mansfield* said: "*And supposing the devise to the issue of B. by any second husband to be void, the limitation to L. could not take place as a contingent remainder.*" And indeed supposing that limitation not to have

no foundation to support this devise, as an immediate devise. *Sed per Lord Mansfield*, when a devise must take effect at the death of the testator, it is not properly an executory devise. Such a devise, is a devise upon a contingent event, which must happen at or before the death of the testator; an executory devise is a devise that is to take place *in futuro*. And the court certified that they were of opinion that the trustees took a *fee*, determinable when the purpose of paying the testator's debts, legacies, and funeral expences, out of the rents, issues and profits of the devised premises, in aid of the personal estate, should be performed. *Vid. 4 Burr. Rep. 2165.*

been

Vide infra,
Gore v. Gore
and Brown-
sword v. Ed-
wards.

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been void, then I apprehend, the subsequent limitation to *L.* might well have taken place; even though the will was not considered as an execution of the articles; as it would then either have taken effect in possession after the death of *C.* and of *B.* without her leaving issue by a second husband; or would then, if *B.* had left any such issue, have vested in interest, as a remainder upon the estate-tail, then become vested in such issue: *Vide* the cases of *Gore v. Gore* and *Brownsword v. Edwards*, hereafter cited, where a limitation after an executory devise in tail being so limited as to take effect, either in lieu of the preceding executory devise, if that failed, or else as a remainder to depend upon it, if that took effect, was good. So here, if the executory limitation to the *heirs of the body* of *B.* had been held good, I don't see that there could have been any objection to the subsequent estate limited to *L.*; for it must have vested, either in possession or interest, at the time when the preceding limitation was limited to take effect: and if it vested only in interest, it thenceforth became liable to be barred by the tenant of the preceding estate-tail, and therefore could not be considered as
extending

extending a perpetuity, beyond what the first limitation itself would do (a).

However, though the validity of the limitation to the heirs of the body of *B.* by any other husband appears to have been questioned in this case, in the same manner as the limitation to the issue-male of *B.* by a second wife

(a) It appears from a note in *Dougl. Rep.* 507. extracted from a copy of Lord *Kenyon's* note of this case, that this decision in the case of *Goodman* vers. *Goodright*, went upon the alternative, either of the niece having taken an estate tail by implication, or of the first devise (to the heirs of the body of the niece by any other husband) being too remote, and, of course the second. The court thought it unnecessary to determine, whether the niece took an estate by implication; and according to Lord *Kenyon's* note, Lord *Mansfield* in giving judgment said "the whole of the case comes to this; whether the testatrix intended by the devise to give the heirs of the body of her niece *A. L.* by a second husband, the remainder or reversion or estate (whatever it is called) after the deaths of herself *E. W.* and *A. L.* and failure of issue between them, or whether she meant to give an estate in possession to the issue of *A. L.* by a second husband"; his Lordship, (therefore being clear that it was not an immediate devise), put the case *entirely* on the remoteness of the first devise.

was,

was, in the above cited case of *Moor v. Parker*, and some ground seems to be afforded us, to infer that the court were not inclined to admit its validity; yet there is no direct or decisive resolution upon the point in this case, any more than in the other of *Moor v. Parker*. But the court in both cases seem to have avoided the point, and declined entering into the real merit of the distinction taken between an executory limitation to a person not *in esse*, when made *per verba de presenti* (as the phrase is) and when made *per verba de futuro*. Of this distinction, however, I shall take occasion to treat in a subsequent page of this essay: and endeavour to shew by some recent cases, that the distinction is no longer attended to.

(341)

Vide infra
430, 431.
Doe v. Carl-
ton, Harris
v. Barnes.

Baldwin v.
Carter.
Fonereau v.
Fonereau,
infra 430.

431. stated *infra* 363. note (a).

1 Rol. Abr.
610. p. 7.
Palmer 50.
Lewknor's
case.

Earl of Staf-
ford v Buck-
ley, 2 Vez.

171.

Pearse v.
Reeve.
Pollex. 29.

The like rule holds in the limitation of a term or personal estate, viz. that a disposition thereof to take effect after failure of *heirs of the body*, or dying *without issue*, without other restriction, is too remote.

Thus, where there was a limitation of a term in trust for R. during his life, then in trust for his wife during her life, and after their deaths in trust for their children during their

their lives; and if *R.* and his wife should die within the term without *issue*, or having issue, if that issue die within the term, then to *W.*, this limitation to *W.* was held void.—There is a long series of cases to this purpose reported by *Pollexfen*, from page 24 to 44. with which I think it unnecessary to trouble the reader in this place, in support of a doctrine so fully established by later authorities; though I shall have occasion to mention some of them in the sequel of these sheets, upon points of a different nature. I shall here content myself with citing only two or three plain leading cases upon the present point.

For instance, where a man possessed of a term, devised it to one, and the heirs-male of his body, and for default of such issue to another, and the heirs-male of his body, this was adjudged a void remainder; for if it should be suffered, a man might make perpetuities of a term.—But the law will no more admit of a perpetuity in one sort of estate, or species of property, than in another (*a*).

(342)

1 Rol. Abr.
611. pl. 1.
Leventhorp
v. Albby.

Again,

(*a*) Thus where a demise was made in 1757, by Sir *John Wroth*, for one thousand years, and a de-
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feazance executed at the same time, declaring it a security for a sum of money and interest; which term was afterwards assigned to Sir *John Baber*, in trust for securing money to him on mortgage, who afterwards assigned it to *Edward Brewster*, by whom it was assigned to *Richard Watson*, in trust for Sir *Edward Brett*, to the intent to wait upon the inheritance intended to be conveyed to Sir *Edward Brett*. After which Sir *Edward Brett* made his will dated in 1782, whereby, "after reciting that "by deed indented, he did purchase of *Edward Brewster* deceased, all, &c. which was theretofore "the lands and inheritance, or reputed to be the "lands and inheritance of Sir *John Wroth*, and "lately purchased by him for the residue of the term "of one thousand years, then to come and unexpired; in which deed there was a covenant from "*Brewster*, that Sir *John Wroth* and his heirs, in "whom the fee of the premises was vested, should "convey the same to him and his heirs; but the "said Sir *John Wroth* dying before such deed was "executed, and leaving issue, an infant, it was then "impossible to have the fee conveyed to him; "wherefore he did thereby declare, and it was his "will and desire, that a conveyance should be "executed by the heirs of Sir *John Wroth*, when "they should attain to their full age, according to "the settlement in tail thereafter mentioned." The testator then devised the said premises to *John Fisher*, eldest son of *Henry Fisher*, and *Elizabeth* his wife, for the term of his natural life, remainder to trustees to preserve contingent remainders, and after the death of *John Fisher*, to the first son of
the

the body of *John Fisher*, and the heirs male of the body of such first son, remainder to the second, third, fourth, fifth, sixth, seventh, eighth, and every other son of the said *John Fisher* successively in tail male; remainder to *Nathaniel Fisher*, second son of *Henry Fisher* and *Elizabeth* his wife for life, with remainder to trustees to preserve, &c. with remainder to the first, and other sons of *Nathaniel Fisher* in tail male, with remainder to *Edward Fisher*, third son of the said *Henry Fisher* and *Elizabeth*, and his sons in like manner, remainder to all and every the other son and sons successively of the said *Henry Fisher*, and *Elizabeth*, and the heirs male of the body of every such son and sons, according to their seniority; and for default of such issue, to the right heirs of *Stephen Beckenham* and *Richard Watson*, their heirs and assigns; and the said testator directed, that the remainder of the said term should remain and be attendant on the inheritance of the premises, according to the limitations aforesaid. And as for all other his real and personal estate he devised the same to the said *John Fisher*, *Nathaniel Fisher*, and *Edward Fisher*; the elder of them to have a double share, and the rest between the other two, and made the said *Stephen Beckenham* and *Richard Watson* executors of his will. And the testator also directed that every person to whom the premises was limited, by the devises aforesaid, should take upon him and use the surname of *Brett*.

In 1683 the testator died, and *John Fisher* took upon him the name of *Brett*, and entered on the premises.

premises. *Henry Fisher* and *Elizabeth* his wife, afterwards died leaving no other issue. *Nathaniel Fisher* died without issue, having made his will, and appointed his brother *Edward* executor, who proved the same; and afterwards died without issue, having also made his will, and appointed his brother *John Fisher Brett* executor, who duly proved the same. In 1713 *Nathaniel Wilkins Brett*, as heir of *Richard Waisson* one of the executors of Sir *Edward Brett* exhibited his bill in the court of chancery, against *John Brett Fisher* and *Edward Fisher*, and against some of the tenants to the premises, praying that *John Brett Fisher* and his brother *Edward*, might be enjoined from cutting down timber on the premises or committing any waste thereon. The cause was heard before Mr. Justice *Tracy* who, upon the plaintiffs giving security against the heirs of Sir *John Wroth*, ordered the master to see what timber had been felled, and the value of it, since Sir *Edward Brett's* death, whereof *John Brett Fisher* was ordered to pay one moiety to the plaintiff.

Afterwards on a rehearing before Lord *Cowper* in 1716, the bill was ordered to be amended, and Sir *Thomas Wroth* the heir at law made a party who by his answer denied any sale by his father, and claimed the right of redemption. No further proceedings were then had, but in 1733, the plaintiff exhibited a bill of revivor and supplement.

From the answer of *Jacob Sawbridge* to this bill, it appeared that *John Brett Fisher* assigned the premises

misses for the remainder of the said term of 1000 years to *William Newland*, for securing a debt. Then *Newland* purchased in the inheritance from the heirs of *Sir Thomas Wroth* who conveyed the same to *George Thompson* and his heirs, in trust for *Newland*. Afterwards the estate and interest of *Newland*, in the premisses became vested in *Sawbridge* he having purchased the same. And *John Brett Fisher* at his death, devised the premisses and all his real and personal estate to *Jacob Sawbridge* his heirs executors and administrators, and appointed him executor of his will.

Afterwards the case came on to be heard before *Sir Joseph Jekyll*, Master of the Rolls, who being of opinion that the plaintiff had made out no title to the inheritance of the premisses, as heir at law of *Richard Watson*, it was then insisted that he had a right to the premisses, for the residue of the term of one thousand years under *Sir Edward Brett's* will, the remainder thereof, subject to the estates of *John*, *Nathaniel*, and *Edward Fisher*, and the contingent interest to their sons, having vested in *Catherine Wilkins* otherwise *Watson*, who was the heir at law of *Richard Watson* at his death, to whom the plaintiff was administrator. But his Honor upon a further hearing was of opinion, that the plaintiff had no title, and therefore decreed that the bill should be dismissed.

From this decree the plaintiff appealed. And, on his behalf, it was said that *Sir Edward Brett*,

having devised the premises as an estate of inheritance, and not as a term, and having, in fact, only a term and no inheritance, the term would not pass : and 2dly, That if he intended to devise the term, the limitation to the right heirs of *Stephen Beckenham*, and *Richard Watson*, was too remote and therefore void. To the first of these objections, it was answered, that the respondents were not at liberty to insist that the testator had not the legal or equitable estate of inheritance in him, for that the conveyance to *John Brett Fisher*, under whom they claimed, from the heirs of Sir *John Wreth*, ought to be understood to be in pursuance of the intent of the testator, and of that equitable right, to which he apprehended himself to be intitled. But if he was not to be considered as intitled to the inheritance, it was conceived that there could be no reason to overturn his will entirely, because it could not take effect in the full extent which he intended. And as to the other objection it was said, that the intermediate limitations to the sons of *John Brett Fisher*, *Nathaniel Fisher*, and *Edward Fisher* were all of them contingent only, and to happen within the compass of lives then in being; and as those contingencies never did happen, and the limitations to the heirs of *Beckenham*, were to take effect immediately on the failure of these contingencies, it could not be too remote, since there never was any person in being who had, or was entitled under the will to have any greater estate, than what was determinable on lives then in being.

On

On the other side it was contended that Sir *Edward Brett*, under the circumstances of the case, had no title to the inheritance, either in law or equity; and, therefore, though he took upon him to devise the inheritance, yet he had no right to do so, nor could the inheritance pass by his will, he having no legal or equitable estate or interest therein, and consequently the appellant could have no title thereto. As to the term of one thousand years, it appeared very plainly, by Sir *Edward Brett's* will, that he had no intention to devise it, as a term in gross; he having expressly directed, that the remainder of the lease should be attendant upon the inheritance of the premises, according to the limitations in the will; and those limitations were such, as were proper only for an estate of inheritance, and not for a term of years. And as he did not intend to devise the term, as a term in gross, but only to devise the inheritance, which he had not, so neither could he entail the term in such manner as he had limited the premises by the will, if he had been minded so to do; because such a limitation of a term tended to create a perpetuity. And the limitation to the heirs of *Watson*, and *Beckenhams*, after failure of issue male of *John Brett Fisher* and his two brothers, was void in its creation, and was such an executory devise, as could never take place by the rules of law. That though in fact *Henry Fisher* left no other sons than *John Brett Fisher*, and his brothers, and they all died without issue, yet that would make no alteration in the case; for the will must be construed as things stood at the time of making it, without re-

gard to any future event. Besides, the testator's intention was plain, that the limitation over was to take place upon failure of issue generally, be it when it would, and not upon failure of issue within such a reasonable time as the law allows of; for he entailed the estate by proper and technical words, under an apprehension of his having a power over the inheritance, and of limiting a remainder after the estates tail should be determined: and if the limitation to the heirs of *Watson* and *Beckenham*, was not good when the will was made, nothing which had happened since made it good. And it was ordered and adjudged that the appeal should be dismissed, and the decree therein complained of confirmed. *Brett v. Sawbridge et al'*, 4 Bro. Cas. Parl. 244. ann. 1736.

A manuscript reference to the above case as a further illustration of this passage having been made by Mr. *Fearne*, in the copy of the last edition, in which, as I have before mentioned, he has pointed out his further intentions, as to the improvement of this essay; I have inserted it here, and though the complex nature of the circumstances attending it, runs into great length, I trust the necessity of stating them, in order to comprehend the grounds of the judgment will be deemed an excuse; for if this case was decided upon the ground of the remoteness of the ultimate remainder, it seems to militate against the principle which grew up about this period of time, and which is stated by Mr. *Fearne* in the original work page 407, "that whatever number of limitations there may be, after the first

first executory devise of the whole interest, any one of them which is so limited, that it must take effect (if at all) within twenty one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest." On which ground the case of *Higgins and Dowler* *infra* 408, and of *Stanley and Leigh* *ibid.* 409, the former of which cases was decided in 1707, and the latter by Sir *Joseph Jekyll* in 1732, and which latter case runs *quatuor pedibus*, with the case of *Brett and Sawbridge*; for no one of the preceding limitations to the sons of *John, Nathaniel, and Edward Brett*, and their heirs, and which carried the whole interest, vested, the executory limitation to the right heirs of *Stephen Beckenham*, and *Richard Watson*, therefore was so limited as to take effect, if at all, within twenty-one years after the period of a life then in being, and therefore seems to me to have been good in event. And as to the words "for default of such issue" they seem to me referable to issue mentioned before, namely issue of *John, Nathaniel, and Edward*; for it seems settled that where there has been a preceding devise, to *issue or children*, "the words in default of issue" have been held to mean in default of *such issue*, to take under that devise. *Vide Luddington v. Kime*, 1 *Salk.* 224. *Blackburne v. Edgelly*, 1 *Peer Will.* 600. and *Goodright v. Dunham*, *Dougl. Rep.* 251. And whether they had or had not issue, would be determined at their respective deaths. And therefore as the case of *Brett and Sawbridge*, was decided in chancery by Sir *Joseph Jekyll* in 1734, who decided
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1 Ventr. 79.
 1 Lev. 290.
 Love v.
 Windham.
 Et Glover
 v. Strothoff.
 Bro. Rep.
 Ch. 33.
 Et infra 394.
 in note (a)
 And vide
 Pollexf. 24.
 & seq.

Again, where *A.* possessed of a term for 99 years, determinable upon three lives, devised the lease to his wife for life, and after her decease to *N.* his son *for life*, and if *N.* should die *without issue*, then to *B.*; it was held that the remainder to *B.* was void, for that the remainder of a term could not depend on a possibility so remote as the *dying without issue (a)*.

And

the case of *Stanley and Leigh* in 1732, which case seems to me to agree in all points with *Brett* and *Sawbridge*, it appears to me that the decision in the latter case, must have turned on the circumstance of the clear demonstration afforded by the will, that the testator did not intend to dispose of the term as in gross, and not on the remoteness of the executory limitation, to the right heirs of *Stephen Beckenham* and *Richard Watson*.

(a) But the trust of a term for raising portions on either of two contingencies, of which one is within the allowed limits, will be good in that event.

Thus where a term of 1000 years was created in a marriage settlement, upon trust, "that in case the settlor should happen to die, without issue male of his body, on the body of his intended wife begotten, or if all the issue male between them, should happen

to

to die without issue, and there should be issue female of the marriage, which should arrive respectively at the age or ages of eighteen years, or be married; then, from and after the death of the survivor of the settlor and his wife without issue male, or in case at the death of the survivor, there should be issue male, then from and after the death of such issue male, without issue, the trustees should raise 500*l.* for one daughter, 1000*l.* for two, and in case of three or more, should assign the whole term to their use. There was issue of the marriage one son and four daughters, who all lived to eighteen, and were married. The father died, then the son died without issue. Afterwards the mother died, and then the four daughters entered, against whom an ejectment was brought by a devisee of the son. And in support of the ejectment it was argued, that the trusts of the term were void: being on too remote a contingency, viz. the dying of the issue of the marriage without issue generally. But the court were clear, that the first part of the contingency was good, viz. "in case the settlor and his wife died without leaving issue male"; and as that happened in fact to be the case, the court would not enter into the consideration, how far the other branch of the contingency might have been supported, which could only come in question, in case the son had survived both his parents. *Longhead on the demise of Hopkins against Phelps and others.* 2 Sir *W. Blackst. Rep.* 704.

So where one devised his estates in *R.* to his son *A.* and his heirs, &c. and the rest of his estates
to

to his son *B.* and his heirs, &c. and if either *A.* or *B.* should die without having settled, or otherwise disposed of the estates so devised, or without leaving issue of his or their respective body or bodies lawfully begotten; or having such issue, such issue should die before his or their age or ages of twenty-one, and without leaving lawful issue, he willed that the premises, so given to such of his sons *A.* and *B.* so dying, should go, and he gave the same unto the survivor of them his heirs, &c. for ever; and if the survivor should die, without having settled or otherwise disposed thereof, or of the estates thereby originally devised to him, or without leaving lawful issue of his body, or having such issue, such issue should die under 21, without issue, and his son *D.* should then be dead without issue, then he gave such of the said devised premises, as should not have been settled or disposed of as aforesaid, unto the right heirs of *E.* then deceased, in fee. Lord *Kenyon* was extremely clear that on failure of the first limitation, the second might have taken effect as an executory devise. *Beachcroft* vers. *Broome*, 4 *Durnf.* and *East's Term Rep.* 441.

Et vide infra 358, note (a) *Hockley* and his wife vers. *Mawby*.

But the last mode of construction is only admissible, where the contingencies are capable of being divided, so that they may be considered as alternate or concurrent, the one to take effect only in case the other fails of taking effect at all.

Thus

Thus in the case of *Proctor* vers. Bishop of *Bath* and *Wells*, where one gave and devised unto the first and other sons of her grandson *T. P.* *that should be bred a clergyman, and be in holy orders*, and to his heirs and assigns all her right of presentation, to the rectory, &c. But in case her said grandson the said last mentioned *T. P.* should have no such son, then she gave and devised the said right of presentation unto her grandson *T. M.* his heirs and assigns for ever. And the testatrix died leaving the said *T. P.* and *T. M.* her surviving; and afterwards the said *T. P.* died without ever having had any son. And the question was whether the devise to *T. M.* could take effect, as an executory devise? And it was argued in support of the devise that it could not, for that it was too remote, because *T. P.* had no son born at the death of the testator, and if he ever should have one such son, he would not necessarily be in orders, within *twenty-one* years after his birth. By the canons of the church, no person could be admitted into deacon's orders before the age of twenty-three, without a faculty, nor could he be ordained priest, before twenty-four. And it was said that the devise to *T. M.* was liable to the same objection, on account of the remoteness of the contingency, for supposing there had been no previous devise, to *T. P.* the devise to *T. M.* would be to him "if *T. P.* should have no son in orders;" but no time was fixed for his taking orders. And such devise being void in its original creation could not be made good by the subsequent circumstance of *T. P.* having no son. On the other side it was contended, that as by means of a faculty or dispensation, such son might take

take deacon's orders at twenty-one, the court would intend those were the orders the testatrix had in contemplation; that the thing devised was the right of representation, which a son of *T. P.* might have exercised, within the time limited by law, by taking deacon's orders by virtue of a faculty, for it was not necessary to give effect to the devise, that he should himself be the incumbent of the living, he might have presented some other person. That there were three contingencies on which the devise depended, the first, that of *T. P.* having a son; the second on that son being bred a clergyman; and the third on his being in holy orders: but if either of these contingencies were good, and the event never happened, the devise over to *T. M.* might take effect; in support of which last mentioned proposition, the above stated case of *Longhead* vers. *Phelps*, was cited. But it was said, supposing the prior devise to be bad, yet there was nothing to render void the devise to *T. M.*, for the limitations in the will were alternate. If *T. P.* should have a son in orders, to take as devisee, *T. M.* would be intirely excluded. But the court were of opinion, that the first devise to the son of *T. P.* was void from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to *T. M.* as it depended on the same event, was also void; for the words would not admit of the contingency being divided, as was the case in *Longhead* vers. *Phelps*, above stated. *Vide H. Blackstone's Term Rep.* in Common Pleas, vol. 2. 358.

We

We may observe from the cases last stated, that executory limitations *originally* too remote, are not allowed to take effect by any modification, or restriction in the execution of them; as in the case of *Proctor* and the Bishop of *Bath and Wells*, before stated in this note, in which it was held, that although *T. P.* died without ever having had any son, yet the devise to *T. M.* could not take effect. *Et vid. Daw v. Pitt, supra* 347. where the executory bequest to *W. D.* failed, though *L. A. P.* died unmarried. And so an executory devise after an indefinite failure of issue, though good if restrained to a failure of issue within twenty-one years after a life in being, yet, if not so restrained in its creation, cannot be eventually supported by a qualification of that sort *in its execution*. As if the issue on whose failure the executory limitation depends actually fails within that period; and this seems to hold as a general rule, where the future interest, which is the subject of the limitation is too remote *in toto*, or where its *very commencement* is too remote: for it is immaterial in such cases how the fact actually turns out; the possibility *at the creation* of such executory limitation, that the event on which its existence depends may exceed in point of time the limits of the generally allowed period of twenty-one years and some months at farthest after a life in being, vitiates it in its birth, such executory limitations being required to be restrained in their creation to take effect within these periods; yet, there are instances of trusts of this nature in their creation only *partially* too remote, which have been executed by equity as to the whole, as near to the
apparent

apparent intent as the rules of law will admit. The case of *Humberston and Humberston*, 1 *Pr. Wms. Rep.* 332. and which is also stated *infra* 392, 393, in which all the persons in being were made but tenant for life, and estates-tail were given to the unborn sons (to whom the testator had limited estates for life only, with successive estates to their sons for life, and so on in *infinitum*, without giving an estate-tail to any of them, or making any disposition of the fee) is an instance of this kind; in which case Lord *Cowper* construed the trust for life to the sons *not in esse*, by implication from the subsequent limitation to their sons, as good and intending estates to them (the sons) and their issue-male, and void only in respect of the restriction to the life of such issue-male, that is, only partially as to that part of the limitation which fell within the principle that forbids the restraining the alienation of property for longer than the period before mentioned.

The case of *Phipps and Kelynge*, stated before page 84. furnishes another instance of this sort. In which last case, the accumulation of the rents and profits, after an unborn son of *A.* had attained twenty-one, would, if permitted to take place, have prevented the alteration of the leasehold estate beyond the period of a life in being, and twenty-one years after, consequently the trusts from the period at which such unborn son attained 21, would, if considered as separate and distinct trusts, have been too remote and void, as exceeding the limits, at which future interests are permitted to take effect. But the

And upon these cases we are to observe, that a term or personal estate cannot, properly speaking, be intailed; for where a term or other personal estate is limited to one in tail, it is an absolute and complete disposition of the whole term to him and his executors; he may dispose of it as he pleases; if he does not dispose of it, it goes to his executors and not to his issue; and it does not revert for default of issue (a). Though a distinction indeed
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1 Roll. Abr.
611. pl. 1.
Leventhorp
v. Ashby.
10 Rep. 87.
4 Inst. 87.

the court, at the same time that it determined these trusts, so far as went to the accumulating the annual profits, after the unborn son of A. attained twenty-one, to be void, in that shape, gave effect to the testator's intention, by considering the subsequent rents, as part of one entire interest, too remote in its creation only *pro tanto*; but, under a connection with the preceding trust, and by an equitable qualification of the trusts of the whole term, capable of being brought within the allowed limits, and in that view good and valid.

(a) But where the personal representative of the first taker of the absolute interest in chattels, claimed against those in remainder, under and by virtue of a covenant only, a specific execution was refused in equity.

Thus where *A.* being possessed of an annuity of 14*l. per annum* for ninety-nine years, out of the Exchequer, on his marriage covenanted with *B.* and *C.* to pay this 14*l. per annum* to his wife, for her separate use, and after the death of either of them, then to the survivor for life, and after the death of both, then to the child or children to be begotten between them, *and in default of such child or children*, then to his own executors and administrators for the residue of the term. *A.* and his wife had issue only one son, who lived to the age of five years, and then died; and after the death of *A.* and his wife, the plaintiff took out administration to the son, and brought a bill in equity against the executors of *A.* and his wife for this annuity; and it was insisted, that the limitation to the executors and administrators of *A.* was void, being after a limitation to the child or children, which was the same as if it had been limited to the issue; and that a settlement of a term on trustees, in trust, to permit the father to receive the profits for so many years of the term as he should live, and after, to permit the mother to receive the profits for so many years of the term as she should live, and then in trust, to permit *their child or children, or issue*, to receive the profits for the residue of the term, would bear no limitation over in default of issue or children, in case there should be any one in being, no more than such a limitation of the term itself would be good; for this would be to introduce and revive all the inconveniencies of a perpetuity which have been so long exploded, and

the trust of a term must be limited in the same manner as the term itself will bear a limitation. But the Lord Chancellor said, this being by way of covenant, no more passed out of the covenantor than to serve the uses expressed; and it was not a disposition of the annuity itself, but only a covenant to pay the 14*l.* *per annum* in such manner; and since it was never divested out of *A.* he would not, on this bill, on any pretence of equity, tear it out of him, or his executors; and so dismissed the bill, though he did not at all dispute the case, if it had been of a term, or the trust of a term settled in such manner, that the remainder would not have been good; but here there was only a covenant to pay the 14*l.* and not the annuity itself, which the reporter says, was thought at the bar an over nice distinction.

But this decree, it is said in *Gilbert's Reports*, seems to be reasonable, because the administrator comes for a specific performance of the covenant, and that *he* cannot do, who was *not* originally in contemplation, or intended to be provided for by the covenant; but that if the term had actually been vested to these uses, then, the interest of the term being vested in the child, and the heirs of his body, as it must be if the settlement had been drawn according to the covenant, it must have gone to the administrator. *Basse v. Grey*, *Gilb. Rep. Eq.* 97. 2 *Vern.* 692. 1 *Eq. Ca. Abr.* 262. 16.

(343) has been taken, between such a devise of a term *in gross*, and of a term *de novo* out of the inheritance; upon the opinion expressed by

The reader will no doubt have observed that in the above case "in default of children" and "in default of issue" are considered as of similar import, and as involving too remote a contingency to admit of a limitation over after it. But I should doubt very much whether, at this day, these contingencies would be considered as similar; for as will be seen hereafter, the courts, even in cases of a limitation over of a term, or chattel interest on a *dying without issue*, are inclined to lay hold of every circumstance they can, to confine it in construction to a dying without *leaving* issue at the time of the death, in order to give effect to such limitation; and it seems but reasonable to infer that the same disposition would disincline them to impose a contrary construction on words, which in their proper sense import that event, and do not extend to a failure of issue generally. It is true that in such a limitation over of a real estate, the words dying without children might reasonably be construed dying without issue, so as to give an estate-tail, in order to carry the estate to the children or issue, agreeable to the apparent intent, who otherwise could not take at all; but the same reason does not hold in respect to personal estates, which would not be carried to the children by such a construction, but vest absolutely in the parent. *Et vide Hughes and Sayer, infra 358.* in the context.

Lord

Lord Coke in *Leonard Lovie's* case, that a devise of a term *de novo* to one and the heirs of his body, shall endure no longer than he has heirs of his body. 10 Rep. 87.

Thus where *A.* seised in fee, demised to *B.* his executors and administrators for 99 years, in trust for *A.* and his wife for their lives and the life of the survivor, and after the death of the survivor, in trust for the heirs of their two bodies, and in default of such issue, then in trust for the heirs of the body of *A.* the husband, and in default of such issue, in trust for the heirs of the survivor of husband and wife. They had issue a son, the husband died, and then the son died without issue, and the mother administered to the husband and son, and assigned the term. After the death of the husband and wife, it was contended by the heir at law of *A.* that all the trusts of this term expectant on the death of husband and wife, either became void by accident, or were originally so in their creation; for that the limitation to the heirs of the bodies of *A.* and his wife, ought to be considered as a contingent estate to the person who should answer that description; which failed in event, because no issue of their bodies survived them both to answer it; for *nemo est bares viventis*; and then both the subsequent limitations

Hayter v.
Rod.
1 P. W. 362.

(344)

were void, being limitations of the trust of a term after a general failure of issue; and so the trust for the husband and wife being determined by their death, and the rest being void, the term had no subsistence for the benefit of the personal representatives of any of the parties; but should be considered as attendant on the inheritance.

And in support of this, the above noticed distinction between a term, created *de novo*, and a term in gross, was insisted upon, viz. that although where *A.* possessed of a subsisting term of 500 years, devises it to *B.* and the heirs-male of his body, the whole shall vest absolutely in *B.*, and though he should die without leaving issue, it shall go to his executors, and not revert for the benefit of the executors of the testator. Yet that where one seised of land in fee, devises it to *B.* and the heirs-male of his body for 500 years, here this term, though it goes to *B.*'s executors, and not to the heirs-male of his body, yet upon failure of such issue-male, the term shall cease for the benefit of the heir at law of the testator. But, in this case it was decreed, that the term should not be attendant on the inheritance; for that the party who raised the term, and had power to sever it from the inheritance, shewed his intention so to do, by limiting

miting the trust to the survivor of him and his wife, and the heirs of such survivor; which, though it was a void limitation, manifested his intention to sever the term from the reversion. (345)

However, we are to observe, that Lord Keeper *Finch* in the case of *Burgis v. Burgis* said, he did deny Lord *Coke's* opinion in *Leonard Lovie's* case, which saith, that in case of a lease settled to one and the heirs-male of his body, when he dies the estate is determined; for *Finch* said it should go to his executors. So likewise Lord *Nottingham* in the Duke of *Norfolk's* case, said it was Lord *Coke's* error in *Leonard Lovie's* case to say, that if a term be devised to one and the heirs-male of his body, it shall go to him or his executors no longer than he shall have heirs-male of his body; for these words are not a limitation of the time, but an absolute disposition of the term; and indeed the decision in the Duke of *Norfolk's* case seems to contravene that opinion of Lord *Coke*.

Vide 1 Mod. 115.

3 Case in Chanc. 30.

That the limitation of a personal estate to one in tail, vests the whole in him, is proved by many cases.

Stratton v. Payne.
3 Bro. Ca. Parl. 257.
Pelham v.

Gregory. *ibid.* vol. 5. 435. et Duke of Montague v. Lord Beaulieu. *ibid.* vol. 6. 255.

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Thus

1 P. W. 290.
Seale v. Seale.
Pre. Chan:
421.

(347)

Thus where one devised that all his money in the government-funds should be laid out in the purchase of lands, and settled on his eldest son *A.* and *the heirs-male* of his body, remainder to the second son *C.* and the heirs-male of his body; and bequeathed the rest of his personal estate to *A.* and *the heirs-male of his body*, remainder over in the same manner; Lord Chancellor held that the personal estate, (*viz.* the residue after what was to be laid out in purchase of lands), could not be intailed, but the whole vested in the eldest son.

Dod. v. Dickinson. Vin.
vol. 8. p. 451.
pl. 25.

So where long Exchequer-annuities for 99 years were given by will to trustees for the residue of the term, *in trust* for *E.* for so many years of the said term as she should live, afterwards to the plaintiffs for so many years of the said term as they or the survivor of them should live, and after the decease of the survivor *in trust* for the *heirs of their bodies* lawfully begotten, for all the residue of the said term, and for default of such issue, in trust for the defendant. Lord Chancellor *King* held the remainder over to be void, and that the whole vested in the plaintiffs to whom the limitation was for life, with remainder to the heirs of their bodies; and accordingly the annuities

annuities were decreed to be sold, and the money to be paid to the plaintiffs. In this case the devise was only in *trust*, and yet the rule was the same.

So where a testator by his will devised that 400*l.* should be put out on good security for his son *T.* that he might have the *interest* of it for *his life, and for the lawful heirs of his body*, and if it should so happen that he should die without heirs, it should go to his youngest son *J. B.* Lord *Hardwicke* decreed that the whole vested in the first taker, and the limitation over was too remote.

(347)

1 Vezey 133.

154.

Butterfield v.
Butterfield.

The same point has been since adjudged in a late great case, where *R. T.*, by will, gave the *profits and half-yearly dividends* of 4000*l.* capital bank stock to Sir *W. P.* during his life; together with the income and payments of six annuities payable at the Exchequer, to *receive the payments* during his life.—And gave his dwelling-house in *London* (being leasehold) and the use of all the furniture and household linen therein, to *M. C.* during her life: and gave to *L. A. P.* (daughter of Sir *W. P.*) his dwelling-house and estate at *O*, and the *use* of all the goods, furniture and linen there, together with all the cattle and
cart

Daw v. Pitt
(since earl of
Chatham)
and Western,
heard at the
Rolls, July
1766.

(348)

cart horses, and the utensils in husbandry, as well as some other estates and leasehold houses, *during the term of her natural life*. And after the death of *M. C.* he gave to *L. A. P.* his dwelling-house in *London* and the use of all the goods therein during her life.—And after the death of *Sir W. P.* he gave to *L. A. P.* the *dividends* on the 4000*l.* bank stock, and all the *payments* growing due on the said Exchequer-annuities *during her life*; and after her decease he gave, bequeathed, and devised all the afore-mentioned land, houses, bank stock, and Exchequer-annuities, to the *heirs-male of her body* lawfully begotten for ever; together with all the furniture in both his houses: and for *want of such issue*, he gave and bequeathed all the said respective estate, bank stock, and annuities unto *W. D.* for life, remainder to the heirs-male of his body, remainder over.

Upon the death of *R. T.*, *L. A. P.* entered on the estates devised to her, suffered a recovery, and sold the real estates: afterwards she devised and bequeathed all her real and personal estate to the said *Sir W. P.* (her father) his heirs, executors and administrators. Her father surviving her, by his will, after giving several legacies, gave and devised all his real
estates,

estates, and all the residue of his personal estate (which residue included the leasehold estates, furniture, bank stock, and annuities devised as above to *L. A. P.*) unto the defendant *W. P.* his heirs, executors, administrators and assigns. After the death of Sir *W. P.* the plaintiff *W. D.* claimed the leasehold estate, bank stock and Exchequer annuities, by virtue of the remainder limited to him in the will of *R. T.* But the Master of the Rolls held the limitation over to *W. D.* to be void, and that the whole vested in *L. A. P.* and therefore dismissed the plaintiff's bill.

(349)

But upon a re-hearing before the Lords Commissioners of the Great Seal, they reversed the order of dismissal, and decreed, that the plaintiff should have the benefit of the said leasehold estates, bank stock, and Exchequer annuities during his life. Afterwards, however, upon an appeal to the House of Lords, the Lords reversed that decree, and thereby established the decision of the Rolls (a).

June 1770.

Vide Earl
Chatham v.
Tothill.
6 Bro. Parl.
Ca. 450.
1771.

Here

(a) Again where *A.* possessed of a considerable real and personal estate (among other bequests) made one in the following words "and further I hereby appoint

appoint my said trustees to lay out at interest, upon real and personal security, as they shall think proper, the sum of 4000 *l.* sterling, part of my said real and personal estate, and to make payment of the interest of the said sum of 4000 *l.* only to *R. G.* the younger son of the said *R. G.* during all the days of his natural life, and to make payment of the principal sum itself to the heirs to be lawfully procreate of his body; but declaring that the above interest shall not be affectable by the debts or deeds of the said *R. G.* (the son) and in the event of his death, without lawful issue of his body, or of his selling, assigning away, or otherwise disposing of the above interest, or any part of it, my will is, that the said sum of 4000 *l.* together with 1500 *l.* sterling further, making in all the sum of 5500 *l.* sterling, shall pertain and belong to *J. H. W.* One question was, whether the remainder over of the 4000 *l.* and the legacy of 1500 *l.* after the death of *R. G.* (the son) without issue of his body, were not too remote. It was argued in support of the limitation, that it was good, from the manifest intention of the testatrix, that it should take place upon the event of (the son) *R. G.* dying without leaving lawful issue. But on the other side it was contended, that the 4000 *l.* was an estate-tail in money executed in *R. G.* the first taker, and the cases of *Butterfield v. Butterfield*, 1 *Vez.* 133, and *Daw v. Pitt*, see *infra* 347, were cited, and it was said, that the case was too strong to admit of circumstances of the intent of the testatrix to contradict it. And per Lord *Thurlow*, with respect to the 4000 *l.* personalty, the cases of *Butterfield v. Butterfield* and *Daw v. Pitt* have confirmed the doctrine

doctrine upon that subject, that it is too late now to argue upon the distinction of principal and interest, or to insist upon circumstances of the intent; the rule must take place with respect to the 1500 *l.* that fell under the same objection. And his Lordship decreed the remainder over too remote. *Glover v. Strothoff*, 2 *Bro. Chan. Rep.* 33.

The Reader will observe, that as to the 1500 *l.* bequeathed in the above case, the legacy so far is original, but being to take effect on the same contingency on which the legacy of 4000 *l.* was to go over, and which was a general failure of issue, there was no room to class this case, in respect of this part of the bequest, with that of *Willington and Willington*, beforementioned note (a) page 339. or others of that nature.

Again, Where S. by his will gave as follows,—
“*Item*, I give and bequeath to *T. M. S.* during the term of his natural life, the interest of 1000 *l.* 3 *per cent.* consol. Bank annuities, to commence the day after my death, to be regularly paid from time to time, in ten days, or as soon as possible after the same becomes due. At his decease it is to devolve to the heir of his body lawfully begotten, and in default of issue, I give and bequeath the same to the heirs of *A.* that shall be then living, in equal shares to be divided. The Master of the Rolls held that the legacy vested absolutely in *T. M. S.* *Robinson v. Fitzherbert*, 2 *Bro. Chan. Rep.* 127.

Sed vid. infra 373, note (a).

Here we observe, that although only the *dividends* and *payments* of the stock and annuities and *use* of the furniture were devised for life to *L. A. P.* and not the stock annuities, or furniture themselves expressly; yet it was held to be the same thing: for as a devise of the *rents* and *profits* of land is tantamount to a devise of the land itself; so *pari ratione*, a devise of the dividends and payments of stock and annuities, and of the use of furniture, seems equivalent to a like limitation of the stock annuities or furniture themselves; for such dividends, payments or use, are the only immediate produce, or value of the stock, annuities or furniture (*a*).

But,

(*a*) But this rule only holds where personalty is so given, as that the words would create a clear tenancy in tail in land.

Therefore where one, being possessed of a considerable personal estate, made his will in *India*, of his own hand-writing, and gave several legacies, and *inter alia*, to the heirs of his brother *R. W.* 300*l.* and gave the residue of his estate to his brother *I. W.* and to his heirs male, *equally to be divided among them, share and share alike*; three questions arose, first, Whether *I. W.* should take the whole, and the words *equally to be divided*, be rejected? Secondly

Whether

Whether *I. W.* and his sons should take as tenants in common? Thirdly, Whether the father should take for life, and after his death the residue should go to all his son's equally? The Lords Commissioners *Smythe* and *Bathurst*, were clear of opinion that, according to the true construction, the father should take the whole for life, and then it should go to his sons equally. *Wilson* vers. *Vansittart*, *Ambler* 562.

So where *D.* being resident in *Calcutta*, and possessed of *only* personal property, made her will, and after giving some legacies, gave all the rest, residue and remainder of her estate, both real and personal, unto *L.* to be placed at interest until her age of 21 years, or day of marriage, and then the whole thereof, together with the interest accumulating thereon, to be paid to, and for her use, during her natural life, and from and immediately after her decease, she gave, devised and bequeathed the same unto the heirs of her body lawfully begotten, *equally to be divided between them*, share and share alike; and in default of such issue, or the death of the said *L.* before her said age of 21 years, or day of marriage, she then gave devised and bequeathed the said residue and remainder of her estate, unto her, the testatrix's, brother. The question was, whether under this will *L.* took an estate for life or an absolute interest in the personal property? And it was decreed at the Rolls that *L.* took only an estate for life, in the property in question. And that decree was affirmed on appeal to the chancellor.

Jacobs

Jacobs et Uxor against Amyatt and others, 4 Bro. Ch. Rep. 542.

And the principle we are now illustrating, is further confirmed by the case of *Knight and Ellis, 2 Bro. Chan. Rep. 570.* in which it was resolved that if the first estate for life be a trust estate, and the remainder to the heirs of the body a legal estate, the latter will take effect; because if such limitation had been applied to land, it would not have created an estate-tail.

In this case one by his will directed that his trustees therein named, should receive the rents, until his nephew *B.* should attain his age of twenty-one years, and pay the same as after mentioned, *viz.* to pay twenty pounds a year, towards the education of *B.* until he attained eighteen, and fifty pounds a year from that time till twenty-one, and the testator further declared "and my will further is that my said trustees and their heirs, shall *permit and suffer my said nephew*, when he shall attain his age of twenty-one years, to receive and take the *interest* of the monies, which shall arise from the rents and profits of my said estates, before my said nephew shall attain his age of twenty-one years, and which shall be placed out at interest as before directed, *during his natural life.* And after his decease, he gave the said monies to the *issue male* of his said nephew, and *in default of such issue*, I give the said monies to my three nieces *M. A. and E.* equally to be divided between them, *share and share alike.* And the question was, whether the nephew took an

an estate for life, or the absolute interest in the accumulated rents and profits? And Lord *Thurlow* said that he thought it pretty plain, that under this will, *B.* took only an interest for life, in the fund in question, and that it was only a contingency on which it was to go to his issue-male; and that the plaintiff's took the fund in the alternative of that contingency; his Lordship said that he observed in a book of great character, and which had treated the subject with great diligence and attention, he meant Mr. *Fearn's* essay, after citing and discussing all the cases on this head in the court of Chancery, he concluded by laying it down, as the rule of this court, *that it will go every length possible to carry the intention of the testator into execution, for the benefit of those to whom the testator designed a benefit.* It must have occurred to the judges, who had decided those cases, that under the idea of making the rules of decision as to leasehold estates, analogous to those which are applied to estates of inheritance, the intention of the testator must be much oftner disappointed than carried into effect; and, then there was no wonder that the court should try to get out of the technical rule, by any means that it could. Now what did the cases come to? A man, by his will, devised to *A.* for life; there being plainly an interest only for life given, if that were all, the disposition would end there as to *A.*, and any other gift would be effectual after his death. The testator then gave the same fund over to *B.* after failure of issue of *A.* what was the court to do? It was clear that a life interest only was given to *A.* It

was clear that no benefit was given to *B.* while there was any issue of *A.* The consequence was, that as no interest springs to *B.* and no express estate was given after the death of *A.* the intermediate interest would be undisposed of, unless *A.* were considered as taking for the benefit of his issue, as well as of himself; and as the words, in this case, were capable of such amplification, the court naturally implied an intention in the testator, that *A.* should so take, that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail; now an estate-tail in chattels was not transmissible to the issue, in the same manner as a real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing, gave the whole interest to the first taker; but if the testator without leaving it to the necessary implication, gave the fund expressly to the issue, they were not driven to the former rule, but the issue might take as purchasers, and then there was an end of the enlargement, of any kind, of the estate of the tenant for life; for another estate was given after his death, to other persons, who were to take by purchase: it no longer rested on conjecture. The word *issue* used in a will, certainly was considered as creating an estate-tail, and that, because the context puts on the word an import, which it had not naturally; but in a feoffment it was not a word of inheritance; and a gift to *A.* and the issue of his body, gave only an estate for life. And his Lordship was of opinion that the issue, if any, would have taken

as

But, we are to remember, however, that although a devise over after a dying *without heirs*, is in general void; yet this rule is not without exceptions; for if the person to whom the limitation over is made, be a relation of and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate-tail; because the limitation over to the collateral heir plainly denotes that only lineal heirs could have been intended. As where *A.* devised lands to *B.* and his heirs, and for *want of heirs* of him, to *D.*, it was adjudged an estate-tail only in *B.* because *D.* was a near relation and heir to *B.* and therefore *B.* could not die without heirs so long as *D.* or any of his lineal heirs existed (*a*).

(350)

Vide Cro.
Jac. 415.
Webb v.
Herring.

3 Lev. 70.
Parker v.
Thacker.

as purchasers, and that in the event that had happened of there being no issue, the limitation over took place.

The above decision coincided with Lord *Camden's* sentiments on the same case, before whom it had occurred, on another question before that under discussion was ripe for decision.

(*a*) *Et vid. S. L. Morgan et Ux. vers. John Griffiths and Others, Cowper 234.*

Caf. Temp.
Talb. 1.
Tyte v. Wil-
lis.

So where *A.* devised lands to his son for life, then to his son *A.* for life, remainder to his son *G.* and his heirs for ever, and if he should die *without heirs*, then to his two daughters; this was determined to be an estate tail in *G.*; for it was impossible he should die without heirs whilst his sisters were living; consequently the testator by *heirs*, could only mean *heirs of the body*.

1 P. W. 23.
Nottingham
v. Jennings.

(351)

The rule holds the same where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee. As where *A.* devised to his second son and his heirs for ever; and for want of such heirs then to the testator's right heirs; here, though the devise to the testator's heirs was a mere nullity, as such heirs must be in by descent, yet it was held sufficient to manifest the intent and aid the construction of an estate-tail.

But, wherever, the remainder after dying *without heirs*, is limited over to one who is not heir to the first devisee, such after limitation does not alter the preceding positive devise in fee; nor will the courts, it seems, in that case, go so far as to restrain the general import of the word *heirs* to that of the words *heirs of the body*.

Thus

Thus where there was a devise to one and his heirs, and if he die without heirs, then to a *charity*. Lord Chancellor said, the devise being to one and his heirs, and if he die without heirs, then over, such devise over was void, and the word heirs should not be construed to signify heirs of the body, where the devisee over is not inheritable.

Attorney General v. Gil.
2 P. W. 369.

So where the testator devised to his son *and his heirs*, and if he should die *without heirs*, remainder over to another who was half brother to the first devisee; upon a question made, Whether the first limitation was in fee or in tail? Lord *Hardwicke* said, it was a plain case, and one of those points which the court would not suffer to be argued, as having been determined before. This was a devise over to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother.

1 Vezey 89.
Tilburgh v. Barbut.
3 Atk. 617.

(352)

Again, a devise may be to one and *his heirs*, with an executory devise over, limited to take place on an event which must happen within the compass of a life in being. As where a testator devised to *A.* and his heirs, and if he should die *before twenty-one*, then to *B.* and his heirs; this was a good executory devise to *B.*

Vin. 8. fol.
112. pl. 38.
Gurnel v. Wood.

Vide Duke of
Norfolk's
case, 3 Chan.
Cas. 1, &c.
and infra
p. 353.

Upon the same principle, though an executory devise to vest on a dying *without issue generally* is not good, because too remote; yet where the dying without issue is restrained to the period of a life in being, an executory devise thereon limited will be good.

Child v.
Bailey.
Cro. Jac. 459.
1 Rol. Abr.
611. p. 5.
Palm. 48.
333.

(353)
Gibbons v.
Summers.
3 Lev. 22.
1 Eq. Abr.
192.

It is true indeed, that in the case of *Child* and *Bailey*, where the testator possessed of a term devised it to his wife for life, and after to *W.* his eldest son and his assigns, and if he died without issue *then living*, to *T.* another son; it was held to be a void devise to *T.* And so again where testator devised a term to his son, and if he died *unmarried* and without issue, then to his daughter, and if his son be married, and had no issue *then living* to enjoy it, then after his son's wife's death to his daughters; the court held that though it should be intended a dying without issue living at his death, yet it would be void according to *Child* and *Bailey's* case.

But however, the authorities of these and other cases of the like nature, have been since over-ruled. The case of *Child* and *Bailey* was cited and commented upon by Lord *Nottingham* in the Duke of *Norfolk's* case, where indeed he denied and decided directly against it; and a great many subsequent cases have been

been decided on the principles upon which Lord *Nottingham* proceeded in his decision of the Duke of *Norfolk's* case.

The Duke of *Norfolk's* case was in effect this. *H. F.* having several sons created a term of 200 years and declared it to be in trust for his second son, and the heirs male of his body, remainder to his other sons; provided that if his eldest son died without issue, or not leaving his wife enseint with a child, living the second son, or that after the death of the eldest son by failure of issue male of his body, the Earldom of *A.* should descend on the second son, then the trust should cease as to the second son and his heirs; and then the trust should be for the third son and the heirs male of his body, with like limitations to the other sons; the eldest son died without issue, living the second son; and the Earldom of *A.* did descend to the said second son. Whether the executory limitation over to the third son upon that event was good, was the question. And Lord *Nottingham*, upon the ground of its being a limitation to take effect upon the dying without issue, within the compass of a life then in being, decreed it was a good limitation to the third son, contrary to the opinion of the three chief justices who assisted

N 4

him;

Duke of *Norfolk's* case.
3 Chan. Ca. 1.
Pollex. 223.

(354)
Vide also the
case of *Wood*
v. *Saunders*.
Pollex. 35.

him; this decree was afterwards reversed by Lord Keeper *North*, but that reversal was again reversed upon an appeal to the House of Lords, who established Lord *Nottingham's* decree.

Vide 1 Eq.
Abr. 192.
1 Vern. 234.

Here we are to observe, that an executory devise of a term, and the limitation of the trusts of a term are governed by the same rules.

1 Salk. 225.
Lamb v. Archer. S. C.
Carth. 266.
Skin. 340.
Comb. 208.
2 Danv. 522.
pl. 5.
3 Atk. 288.

So where the testator possessed of a term for years, devised the lands to *B.* and to the heirs of his body, and if *B.* should die without issue, living *C.* then to *C.* the court held this a good limitation to *C.* the contingency being to arise within the compass of a life in being.

(355)
1 Eq. Abr.
193.
Fletcher's
case.

And again where a testator devised his term to his wife for life, and after her death to *R. F.* for life, and after her death to *T. F.* and his children, and if the said *T. F.* should happen to die before the expiration of the said term, not having issue of his body *then living*, then to go over to *D.* for the residue of the term; this limitation to *D.* was decreed good, the contingency being confined to a death without issue *then living*; for though it was contended, that the words *then living* related only to the other

other words *before the expiration of the term*, yet it was answered, that those words must relate to the time of the death, otherwise there would be no difference between this and the common limitation over of a term if one *die without issue*; for there it must be intended *dying without issue before the expiration of the term*, there being nothing to limit over after the expiration of the term.

So an appointment by will to *A.* and if he died without issue under twenty-one, then over to others, was held a good limitation by way of executory devise; as it depended on a contingency to arise within the compass of a life then in being.

Thrustout v.
Denny.
1 Willf. 270.

It is the same if the *dying without issue* be confined to the compass of 21 years after the period of a life in being.

Vide supra,
p. 318.

This appears in the case of *Maddox* and *Stains* above cited, and will further appear in the case of *Stephens v. Stephens*, and in other cases cited hereafter, in respect to the eventual validity of a subsequent executory limitation, where a preceding one happens not to take effect.

Supra 320.

(356)

Again

Sheffield v.
Lord Orrery.
2 Atk. 282.

Again in the case of *Sheffield v. Lord Orrery* where the testator, if he should leave no legitimate son or daughter who should *leave* any *child behind* them, in such case of their dying without *leaving* issue behind them, willed and directed, that C. should have his estate both real and personal, &c. one question was, whether the limitation of the personal estate, was not too remote? Lord *Hardwicke* held that the limitation being confined to the period of a life, was warranted by the rules of law; and he observed, that although it was certain that a limitation of a personal thing, could not be allowed after a dying without issue generally; yet if it were confined to the extent of a life or lives in being, or within ten months (or the birth of a child) after a life in being, or to the death of such child before the age of 21, the limitation would be good.

Vide infra.

(357)

Indeed with respect to executory devises of terms for years, or other personal estates, the court of Chancery has very much inclined to lay hold of any words in the will, to tie up the generality of the expression of *dying without issue*, and confine it to dying without issue *living* at the time of the person's decease.

Thus

Thus where *A.* devised lands to his wife for life, remainder to his son *T.* and his heirs; provided that if the said *T.* should die without issue of his body, then he gave 100 *l.* a-piece to his two nieces *C.* and *D.*, to be paid *within six months after the death of the survivor of his said wife and son T.* by the person who should inherit the premises, and in default of payment as aforesaid, the testator devised the lands to the legatees for payment: this dying without issue was construed a dying *without issue living at his death* (for it clearly appears, that an indefinite failure of issue at any time was not meant, by the legacies being limited to be paid within six months after the death of the *survivor* of the mother and son) and therefore upon the event of such a contingency, the limitation would have taken effect: but as the son died leaving issue, though that issue died within six months after the death of the son, the court held the legacy not due; as the contingency (of dying without issue *then living*) had not happened.

1 P. W. Nichols v. Hooper 198.

It is said indeed in the report of this case, that where a legacy is given on a *dying without issue*, it shall be understood a dying without issue *then living*. But it is to be observed that

(358)
Vide 2 Atk.
313.

that such a construction was not necessary to make the limitation good in this case, for the reasons I have given; and that such a construction is not allowed, without some restrictive circumstances in the limitation, *Vide Fitz-Gibb. 68. Green v. Rod, and 1 Burr. 272-3.* and other cases hereafter cited.

Target v.
Gaunt.
1 P. W. 432.

So where a testator devised to his son *A.* for life, and no longer, and after his decease to such of *A.*'s issue as *A.* should by will appoint; and in case *A.* should die without issue, then he devised the lands over. These words upon the whole of the will were construed to mean issue living at his death; because it was to be intended such issue as *A.* should or might appoint the term to, *viz.* issue then living (*a*).

Again

(*a*) So (in the case of *Hockley* and his wife against *Mawbey*, 3 Bro. Rep. Chan. 82.) where one devised money to be laid out in a purchase of freehold estates to be settled on his wife for life; and also gave his wife freehold and leasehold estates for her use: and from and immediately after her decease, he gave, devised and bequeathed the same, and every part thereof, in the following manner, *viz.* unto his son *R.* and to his issue, lawfully begotten, or to be begotten, to be divided amongst them, as he thinks fit:

fit: and if my said son shall happen to die, without issue lawfully begotten, my will is, that as well my present freehold as leasehold estates, as the estates hereby directed to be purchased, shall be sold, and the money arising therefrom shall be equally divided between my brother *T. R.*'s children, my sister *W.*'s children, and my sister *P.*'s children. And I hereby order and direct, neither the estate directed to be purchased, nor any of my present freehold or leasehold estates may be sold or disposed of during the life of my wife or my son. One question was, whether the devise to the brother and sister's children was or was not too remote, as depending upon the son's dying without issue? And it was held to be a contingency with a double aspect; in one event a gift to the children of the son if he should have any, and if he should not have any child, that then the estate should be sold for the purposes of the will. That he did not mean the estate to go as an estate tail, but that the children should take distributively, in which case they must take as purchasers, and the consequence was that *R.* took only an estate for life, he had a power to divide, and it was sufficient that the division must take place at the death of *R.* which was, within the rules. Two events were provided for, 1st. There being children of *Richard*, in which case they would take. 2dly, There being no children, in which case the estates vested in the persons described.

And in the case of *Donne* vers. *Merrifield*, heard at the Rolls, 22d October 1730, and cited *Ca. Temp. Talbot*, Where the devise was of a term to his brother

1 P. W. 534.
Hughes v.
Sayer.
Vide infra
370.

Chanc. Prec.
528. Nicholls
v. Skinner.

(359)

Again where *C.* having two nephews *A.* and *B.* devised the surplus of his personal estate to them, and if either of them should die without children, then to the *survivor*. It was held that dying *without children* must in this case be taken to be dying without *children then living*; because the immediate limitation over was to the *surviving* devisee.— So where *A.* devised portions to his four children, payable at their respective ages of 21 or marriage, and in case any of them should die before the time of payment, or *without issue*, then his or their portion to go to the *survivors or survivor*, and his heirs: it was held this could not be a dying without issue generally, but so as the *survivor* might

ther *John* for life, then to such person as he should marry, for her jointure; and after her death to the heirs of the body of his brother *John*, and the *executors, administrators and assigns* of such heirs, during the residue of the term; and for default of such issue of his brother *John* then to *Henry Donne*; the limitation to *Henry* was held good; the words being taken to be heirs living at his death. The ground for which conclusion seems to me to have been, that the extending the limitation to the heirs of the body of his brother, to the executors, administrators and assigns of such heirs, shewed that the brother himself was not meant to take an estate-tail.

take;

take; which must be during the life of some or one of them, and so was good.

And where the testator made his wife executrix, and gave her all his goods and chattels, provided that if she should die *without issue* by the testator, *then after* her decease *sol.* should remain to the testator's brother; the words *then after* were taken to mean *immediately after*, and consequently to restrain the dying without issue to the time of her death.

Pinbury v. Elkin.
1 P. W. 563.
Vide Paine v. Stratton, infra.
et Brooks v. Taylor, infra
373 Note (a)

So where a term was devised to *A.* for life, remainder to such children as the testator should leave at the time of his death, and if all such children should die without *leaving* any issue, then to *B.*: this was a good executory devise to *B.* and the words "Without *leaving* any issue" were understood to mean "*leaving any issue* at the time of their deaths." Again where one devised a personal estate, in trust, to be settled on his daughter *or* (a) *the heirs* of her body, but in case his said daughter should die *leaving* no heirs of her body, then over to others; Lord *Hardwicke*

3 P. W. 258.
Atkinson v. Hutchinson,
Vide same point.
1 P. W. 663.
Forth v. Chapman,
cited infra.
Martin v. Long, Prec.
Chan. 15.
2 Atk. 642.
Read v. Snell.
Vide Fairfax v. Heron,
supra 316,
S. L. as to freehold.

(a) *Nota*, No express gift is here made to the mother for life, but that was held by Lord *Hardwicke* not to be material, and observe that "*or*" was by him construed "*and*."

decreed

decreed the limitation over good, upon the contingency of the daughter's dying without issue *living* at her death; as he considered the word *leaving* as relating to that time.

(360)

3 Atk. 396.
Lampley v.
Blower.

So in another case, where the testatrix gave to her two nieces *F.* and *L.* each one half of the produce of bank stock, and to *their issue*, and if either of them should happen to die before the legacy became due to her, and leave no issue, the share of her so dying should go to the survivor; the words *and leave no issue* were construed "leave no issue *living* at the time "of her death." (a)

It

(a) So where one possessed of premises for a term for years "gave them to his grandson *P.* son of *D.* and his wife, and the heirs lawfully of him for ever, but in case he should happen to die and *leave* no lawful heir, then and in that case he gave them after the death of his said grandson *O.* to the next eldest son or heir of *D.* and his wife; and so on to the next eldest son or heir, if the last should die without heirs" *P.* took possession and died without issue, and on his death the next eldest son of *D.* and his wife brought an ejectment, and Lord *Kenyon* without hearing the argument said, that on conference with the rest of the court, they were clearly of opinion, that the limitation over was good. This was a chattel interest limited to *P.* and the heirs lawful of him for ever, but in case he should happen to die and leave

It has indeed been held, that where the *interest* of money was devised to one for life, and if he die *without issue*, the *principal* to go over, that such a limitation was good; upon a distinction taken, between the devise of the interest of money, and of money itself. But that distinction has been repeatedly over-ruled and exploded, as appears in the above cited cases of *Butterfield v. Butterfield*, and of *Daw v. Butterfield*, and of *Daw v. Pit*.

Smith v. Clever.
2 Chan. Rép.
410. & vide
same case.
2 Vern. 38.

supra page
347.

There is a case of a very different nature from the foregoing, where a portion for a daughter limited after an indefinite failure of issue-male was allowed to take place. It was the case of a settlement on husband and wife, for their lives, remainder to the first, &c. son in tail-male, and if the husband should die *without issue male*, remainder for a term to raise 1500 l. for portions for daughters; the

1 Lev. 35.
Goodwin v.
Clerk.
2 Sid. 102.

no lawful heir, then over, &c. now it was apparent on the will, that the testator "by lawful heirs" meant, "heirs of the body" and "leaving no lawful heir" must be confined to "leaving no issue at the time of his death." *Goodtitle on the dem. of Peake* vers. *Pagden*, 2 Durnf. & East Term Rep. 720.

Vid. infra 373. note d.

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O

husband

(361)

husband died, leaving issue a son and a daughter, the son died without issue; it was adjudged that the daughter should have the 1500*l.*; for that whenever the issue-male of the husband failed, he might properly be said to be dead without issue-male: here we observe, as there was a preceding estate-tail, a recovery suffered by tenant in tail would have barred this term, and the daughters' portions; and therefore the allowing the limitation to take effect, was not running into the inconveniences of an executory devise, limited on so remote a contingency; because this limitation was liable to be barred, whereas an executory devise is not.

But though the courts, in the case of *personal estates*, generally incline to pay attention to any circumstance or expression in the will, that seems to afford a ground for construing a limitation after dying *without issue*, to be a dying without issue *living at the death* of the party, in order to support the devise over, yet in the case of a real estate, it seems the construction is generally otherwise; for there we are to consider the interest of the heir at law is concerned; which is always much favoured by our laws.

Lee v. Vincent, Cro.
Eliz. 26.

1 Leon. 285.

3 Leon. 106.

I

Therefore,

Therefore, where a testator gave the residue of his real and personal estate to his nephews *W.* and *G.* and if either of them should depart this life, and *leave no issue* of their respective bodies, then he gave the said premises to *D.* Here Lord *C. Parker* observing that the devise carried a freehold as well as a leasehold, nevertheless, thought it might be reasonable enough to take the same word in two different senses, as to the two different estates; and that as to the freehold, the construction should be, if *W.* or *G.* died without issue, *generally*, and as to the leasehold the same words might be construed to mean a dying without *leaving issue at their death (a).*

(362)
Forth v.
Chapman.
1 P. W. 667.

Mr.

(a) But words are taken in two different senses, only in cases where the intent will be best answered, by so understanding them; and therefore if it appears, from the instrument, that the testator intended the estates should go together, the same construction will be given to the same limitation as to both.

Thus in the case of *Richards* vers. *Lady Bergavenny* 2 *Vern. Rep.* 324. where an estate together with the furniture of the house, was limited to *Lady B.* and such heir male of her body as should be living at her death, and in default of such, the remainder

Vide 3 Atk.
288.

Mr. *P. Williams* indeed, in a note upon this case, says, that by the will the limitation over was expressly restrained to the leasehold, though in Lord *Macclesfield's* notes that word was omitted. But it seems that Lord *Hardwicke* in the case of *Sheffield v. Lord Orrery* observed, that Mr. *Williams* is mistaken in that note, for that upon looking into the case, it appeared, that both freehold and leasehold were devised by the same words.

over; the question was whether the goods should go over to the remainder-man, or whether the absolute property thereof vested in the Lady *B.* *Et per curiam*, the limitation of the estate "to the Lady *B.* and such heir of her body as should be living at her death, with a remainder over for want of such," is an estate tail, and the limitation making an estate tail in the land, the goods disposed in the same clause must go in the same manner, and consequently the absolute property is in the first devisee, and no remainder of goods after an estate-tail is good; for the words "heir of her body" must not, as to the land, be construed to be a word of limitation, and make an estate-tail, and as to the goods, to be only words of designation of the person intended to take the goods, and besides his intention appears, that the goods should go along with the house, and the devisee to have like interest in both.

Again

Again where a testator having two sons *W.* and *R.* devised, that if *W.* his eldest son should happen to die, and leave no issue of his body lawfully begotten, that then and in that case, and not otherwise, after the death of *W.* his said son, he gave and bequeathed all his lands of inheritance in *L.* unto *R.* to have and to hold the same after the death of the said *W.* to him and his heirs; it was held, that *W.* took an estate-tail by implication (*a*); and that the limitation to *R.* was a remainder, and not an executory devise (*b*).

Walter v. Drew.
Com. Rep. 373.
And vide 2 Vez. 615.
Et vide Wealthy v. Bosville,
supra 300.
(363)

We

(*a*) The reader may observe that this is the case of a devise to a younger son, in case the eldest son should die without issue, and so operating by way of *restraining the fee*, that the eldest son would otherwise have taken, and in that respect, differs from cases like *Laneborough* and *Fox*, *supra* 325. where the limitation is to the heir after failure of the issue of one, in whom no estate would otherwise vest, by implication on the will, either to be abridged or enlarged.

(*b*) The construction of the words "leave no issue of the body" as applied to real estates, in contradistinction to its sense, as applied to personal estates, was recognized by Lord *Hardwicke*, in the case of *Sheffield* vers. Lord *Orrery*, 3 *Atk. Rep.* 288.

in which his Lordship cites the case of *Forth* and *Chapman*, as an authority in this respect. And the same distinction was again recognized, and the same case resorted to as an authority by Lord *Hardwicke*, in the case of *Southby v. Stonehouse*, 2 *Vez. Rep.* 606, in that of *Stafford and Buckley*, *ibid.* 180. and in that of *Errol and Wallace*, *ibid.* 125.

(32) And in the case of the University of *Oxford* *vers. Clifton*, *Ambler's Rep.* 385. this principle was carried to a greater length than it seems, from subsequent cases, would now be permitted; for there, one by his will devised lands, of which he was seised in fee to *C.* and the issue of his body lawfully to be begotten living at his death, and for want of such issue to the University of *Oxford*, to be disposed of in such manner as in the will is directed. And the question was, whether *C.* was entitled to an estate-tail or for life only? And it was argued that he was entitled to an estate for life only, with contingent remainder to his issue, if he should have any such at his death, for the life or lives of such issue remainder to the university. That the word "*issue*" in this case was a special *designatio personæ*; that every word in a will ought to have a sense put upon it; that the words living at his death were capable of a construction; that "for want of such issue" meant "issue living at his death;" that the period when the children's estate was to begin, was the death of *C.* and the case of *Lovelace* *vers. Lovelace*, *Cro. Eliz.* 40. was cited, wherein there was a devise to *C. D.* and his issue-male, he having no son at the time; which was adjudged no estate-tail, but
for

for life only; that the word eldest would not admit such a construction as to give an estate-tail. But Lord Keeper Henly said this was the plainest case he ever saw in his life; the issue could not take by present devise as jointenants with C. The issue were not to take by remainder, but by descent, as all the posterity were intended to take, it could not be a Contingent Remainder, but an estate-tail.

And the court of King's Bench unanimously adopted the sense in which the words "leave no issue" as applied to land, are accepted by Mr. Fearn in the case of *Denn ex dem. Geering* vers. *Henton*, 2 Cowp. Rep. 410. In that case one seised of premises in fee gave and bequeathed to his grandson S. all that his meadow, &c. to hold unto S. and the heirs of his body lawfully begotten, *and their heirs for ever*, chargeable nevertheless, and charged with the payment of eight pounds a year unto M. during her natural life: but in case S. *should die without leaving issue of his body*, then he gave and devised the same to G. to hold to him and his heirs for ever; chargeable as aforesaid, and also chargeable with and subject to the payment of 100 l. unto his the testator's niece within one year after G. or his heirs should be possessed of the same premises. S. entered and died seised, leaving issue a son, who also died seised, having previous to his death, made his will, and devised the same to his mother, and her heirs and assigns. And the question was what estate S. took under this will? And it was contended, on behalf of the mother, that the son of S. took a fee simple, the words "heirs of the body" operating

as words of purchase to answer the intent; and it was said that a strong circumstance was, the legacy of 100*l.* devised to the first testator's niece, in case S. should *die without issue*, of necessity therefore the testator must mean a dying without issue, at the time of his death; for if he intended she should wait till a *total failure of issue*, she might wait for 100 years, or for ever. But Lord Mansfield said the distinction was, between a devise of lands and personal estate: in the latter case, the words were taken in their vulgar sense; that was, *dying without leaving issue at the time of his death*. The question was, whether the grandson took an estate-tail or an estate in fee. The devise was to S. and the *heirs of his body*, and *their heirs for ever*, but the words "*their heirs for ever*" were qualified by the subsequent words "*in case he shall die without leaving issue*" which clearly shewed it an estate tail; and then the testator gave it over to the mother. It was too clear to admit of a doubt. And the other three judges concurred. *Denn ex dem Geering* vers. *Shenton*, 2 Cowp. Rep. 410.

The conclusion from these authorities has been, that the words "*dying without leaving issue*" shall have the same construction as the words "*dying without issue*," in the limitation of real estates, wherever the limitation over *can take effect, as a remainder under that construction*. It is a decision founded on the established doctrine laid down by Sir Mathew Hale in the great case of *Pursey and Rogers*, stated *supra* 299. and resorted to, recognized and proceeded upon, by all the courts in many subsequent decisions. *Vid.* the cases of *Walter and Drew*,
Southby



Southby and Stonehouse, Wealthey v. Bosville, supra 300, *Doe on dem. Brown v. Holmes, ibid.* 293; and in *Wrinkle vers. Billington, Dougl. Rep.* 729.

In the last mentioned case, one made his will and (*inter alia*) gave and devised to his wife *Elizabeth*, and unto his daughter *Ann*, all that his messuage, &c. to hold unto his said wife *Elizabeth*, and unto his daughter *Ann*, for and during the term of their natural lives, and the life of the longer liver of them, in equal proportions, share and share alike. But in case his said daughter *Ann* should happen to marry and have issue lawfully begotten, then, and in that case, after the decease of his said wife, he gave and devised all and singular the said messuage, &c. unto his said daughter *Ann* and to her heirs and assigns for ever. But, if his said daughter should happen to die single, and unmarried, and without issue of her body lawfully begotten, then and in that case, he gave and devised all and singular the aforesaid premisses last above mentioned, unto his said wife *Elizabeth*, and to her heirs and assigns for ever. *Ann* survived *Elizabeth*, and suffered a recovery. And the question was, whether the limitation over to the testator's wife and her heirs, was barred by the recovery? And it was contended that it was not; for that this was either an executory devise, and not too remote in its creation, or a vested remainder after estates for life, to *Elizabeth* and *Ann*, and the survivor, and a contingent estate-tail to *Ann*. And, on the first point, an attempt was made to distinguish this case from the case of *Luddington and Kime*, and other cases of the same sort, on the ground that in those cases the limitation

over



over was such, that though the contingency on which it was limited, should happen before the end of the original specified duration of the particular estate, yet it must await the natural expiration thereof. This was essential to the idea of a remainder according to the definition thereof. But here the limitation to the daughter *Ann*, in case she should marry, and have issue of her body, was not to wait till the natural expiration of the first estate for life to her, but was to take effect in her life-time, as soon as the contingency on which it was limited should happen. It was therefore *not a remainder*, but a *conditional limitation*. As soon as she had married, and had issue, the estate to her and her heirs, would have taken effect, and would have enlarged her interest, and merged her estate for life; as an executory devise, it was not too remote, for it was limited to vest, if at all, on the death of the daughter. 2dly. It was contended that if the limitation to the daughter took place as a remainder, there were words to restrain it to an estate-tail, in which case the last limitation over was a vested remainder, and of course not barred by the recovery. On the other side, it was contended, that whether the daughter took an estate-tail, or only an estate for life, the remainder over was barred by the recovery. If she took an estate-tail, the case was clear, but if she only took an estate for life, then the limitation to the widow was a contingency with a double aspect; it was a concurrent remainder in fee, created in the alternative, with a Contingent Remainder in fee, to the daughter; and a recovery having been suffered by the tenant for life, every body was barred, but the heir

heir at law, which was the daughter. And it was said, that it was impossible to distinguish this case from those of *Luddington v. Kime*, 1 *Ld. Raym.* 203. and stated *supra* vol. 1. 547. *Doe v. Holmes*, 3 *Wils.* 237, 241, et stated *supra* vol. 1. 548. and *Goodright v. Dunham*, *Dougl. Rep.* 251. et *supra* vol. 1. 550. that the second limitation to the daughter was capable of taking effect as a Contingent Remainder in fee, and of course that to the widow was so; and it was an established maxim that whenever an estate could take effect as a remainder, it should not be construed to be an executory devise. *Et per Lord Mansfield*, it is perfectly clear and settled, that where an estate can take effect as a remainder, it shall never be construed to be an executory devise, or springing use. Here the first limitation is to two persons and the survivor, so that a preceding freehold will lie in the survivor, and the estate over is limited on a contingency upon which a remainder may depend. It is to the daughter and her heirs (not issue) if she should marry, and have issue, and it must have taken effect after the death of the survivor. There was another contingency, on the event of the daughter dying unmarried, and without issue (not on failure of her issue) and upon that event, the limitation is to the widow in fee. But the tenant for life by the recovery has barred the Contingent Remainders.

And great reliance was placed upon the maxim of which we are now speaking in a modern case of *Roe* vers. *Scott and Smart* in the Common Pleas, *Easter Term* 27 *Geo. 3.* which came before Mr. *Fearne*, and
was

was tried in consequence of, and decided agreeable to, an opinion he delivered upon it.

In this case the testator devised certain lands to his son *James*, to hold to him his heirs and assigns for ever; and other lands to his son *John* to hold to him and his heirs and assigns for ever; and other lands to his son *Thomas* and to his heirs and assigns for ever; with this express condition, that his son *Thomas* his heirs and assigns, should yearly pay to a granddaughter of the testator's the sum of 3 *l.* till her age of sixteen, and the testator charged the same premises with such payments: and then added that his will and mind was, that if either of his three sons should depart this life, without issue of his or their bodies, then the estate or estates of such sons should go to the survivors or survivor; and if all his said three sons should happen to die, without such issue, then he devised all the said premises, to his four daughters, and their heirs and assigns for ever. And he further charged the premises, so as aforesaid by him devised to his said son *Thomas*, and his heirs, with the sum of forty pounds to be by him or them paid to his said grandchild, at its age of twenty-one years. The three sons survived the testator, and entered, and *John* died some time after intestate, and unmarried. And it was held that the devise to *Thomas* did not give him the fee, but an estate-tail, which descended to his daughter, and upon her decease without issue, the estate went over to *James* the then survivor of the three brothers, and not to the heirs of the said daughter to whom *James* was only related of the half blood.

The

The above is the best note I have been able to procure of the case, and is taken from Mr. *Fearn's* manuscript opinions, and the reader will observe that in this statement of the case there are several circumstances which tend to shew that the testator in this case meant the word heirs, to operate in its full sense, as applicable to heirs general and carrying a fee-simple, and not in its restricted sense, as denoting heirs of the body. First from the circumstance of the word "assigns" being annexed not only to the limitation, but to the condition for paying him the annuity, which although not sufficient of itself to prevent the restrictive operation of the subsequent words "depart this life without issue" yet becomes material when assisted by other words and circumstances in aid of the intention. Secondly from the circumstance of the limitation over, being to the survivors or survivor, and apparently carrying an estate to them or him for life only, which furnishes a reasonable ground, to confine the contingency in construction to a death without issue, during the lives in being, which has been held in executory devises to be a reasonable construction, if it falls within the limits of ever so many lives in being at the same time.

But this rule or principle, or maxim of construction "That a limitation shall never operate as an executory devise, where it may take effect as a remainder," may be over-ruled, where the intent of the testator, or author of the trust or limitation, plainly appears to contradict the legal construction of the limitation; for the intent of a testator, shall
always

always prevail, if not contrary to law, which means, "if the limitation be such as the law allows," but does not mean, that the words shall be taken in such sense as the law imposes upon them.

Thus in the case of *Porter* *vers.* *Bradley, Durnford* and *East's Term Reports* vol. 3. 143. Where one devised as follows " *item* I give and devise unto my son *P.* his heirs and assigns for ever, all that messuage and tenement wherein I now live : but my will is, that in case my son *P.* shall happen to die, "*having no issue* BEHIND HIM" then my said wife, (meaning his then wife) shall receive, and take the rents issues and profits thereof, and dispose of the same at her will and pleasure, and shall have, use, and enjoy all my in-door goods, as long as she shall continue a widow, and no longer ; and after her decease, or marriage as aforesaid, then the lands, so devised to *P.* as aforesaid, I give and devise the same for want of issue by him as aforesaid, unto my son *D.* his heirs and assigns for ever ; chargeable nevertheless with the payment of 50*l.* a piece to my six daughters and their issue, within a twelve-month after he shall so enjoy the same. But in case my son *D.* shall happen to die before my son *P.* and the said *P.* shall not leave any issue of his body begotten, then my will is, that my said land shall be sold, and equally divided between my six daughters and their issues." *P.* entered into possession upon the death of the testator, suffered a recovery, and sold the estate, and died in the life-time of *D.* The six daughters of the testator also died in the life-time of *D.* some without issue, and others leaving children. And

one question, on a case sent out of the court of Chancery to the court of King's Bench, was, what estate *P.* took under the will of his father? And it was contended on one side, that the limitation over, after the devise to *P.* was not good as an executory devise, being on a contingency *too remote*: that there was no case of real property, where the words "leaving no issue," were to be confined to "leaving no issue at the time of the devisee's death" unless particular words were added, which necessarily limited them to that meaning. Then the contingency in this case, which was not to take place till an indefinite failure of issue of *P.* was too remote; and the distinction taken by Lord *Macclesfield* in the case of *Eorh v. Chapman*, stated *supra* 362. was mentioned. And it was said, that in a subsequent part of the will, the words "having no issue" were explained by the words "for want of issue:" and that the words were used in the same sense in both places; and that, notwithstanding the first limitation was to *P.* his heirs and assigns for ever, which *prima facie* imported a fee, yet the subsequent words confined it to an estate-tail. *Sed per* Lord *Kenyon* Chief Justice. The general rules respecting limitations of this sort have been for many years well settled. The first question that arises in this case is, whether this is an estate tail, or in fee? The first part of the devise to *P.* *prima facie* carries a fee; for it is to him his heirs and assigns for ever; but it is clear that those words may be restrained by subsequent words, so as to carry on an estate-tail. If the subsequent part of this devise had been "and in case he shall die without heirs, then over" it would

would have given to *P.* an estate-tail, which he might have barred by the recovery. But here the words were "but in case he shall happen to die, leaving no issue BEHIND HIM," which made a very material difference, and brought it within the case of *Pells* vers. *Brown*, (stated *supra* 306.) which was the foundation, and as it were the *magna charta*, of this branch of the law. But the defendant's counsel had attempted to distinguish this case from that of *Pells* vers. *Brown*; because *there* the words were "if *Thomas* (the first devisee) died without issue, living *William* his brother:" but it was to be observed, that there were words in this case equivalent to those, namely, "if *P.* should die, leaving no issue *behind him*." If indeed, only the first words "leaving no issue" had been used, they according to the opinion of Lord *Macclesfield*, in the case of *Forth* vers. *Chapman*, must be restrained to "leaving issue at the time of his death." But it was contended this rule was confined to *chattel* interests only: however a great deal of argument was necessary, to convince his Lordship, that, in the case of realty, those words should be taken to mean *an indefinite failure of issue*. It would be very strange, if these words had a *different* meaning, when applied to real and personal property. If such a distinction existed in the law, it certainly would not agree with the rule, *lex plus laudatur quando ratione probatur*: but it was not founded in law. And there were *even* additional words in this case "leaving no issue *behind him*" which necessarily imported, that the testator meant *at the time of his son's death*. The subsequent parts of the will also conveyed the same idea; for the deviser men-

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tioned this event as likely to happen in the life-time of his widow, or of his younger son, or daughters. Therefore, his Lordship said, he had not the least doubt, but that this was a good executory devise, to take place within the time allowed by law, which was borrowed by analogy from legal formal limitations; namely for a life or lives in being, with a remainder in tail, to unborn children, who could not bar it till twenty one. *Ashurst* and *Grose* Justices were of the same opinion.

The reader will no doubt have observed, that I have introduced this case of *Porter* and *Bradley*, as furnishing a ground from the *peculiar penning* of that part of the will, upon which the question agitated therein, arose, for distinguishing it from those cases, in which the words, "without leaving issue" had, as applied to real estates, been considered as importing a general failure of issue; first, from the words "assigns for ever" attached to the first limitation to *P.* secondly, from the words "behind him" following the words "leaving no issue" the former of which words *viz.* "assigns for ever" are strongly indicative of an intention, that the devisee should take an assignable estate to him and his heirs, though not of themselves, as I have before observed, sufficient to take the case out of the principle, or rule of construction, "that a limitation shall never operate as an executory devise, where it may take effect as a remainder:" And the latter of which words *viz.* "behind him" which appear to me to confine the devise over *in expression* to the event of

the first devisee's leaving no issue living at the time "of his decease" and to bear exactly the same sense, as "then living," which, on the authority of *Pell* and *Brown's* case, clearly create an executory devise. And indeed there is great reason to conclude, that the *latter words* were much relied upon in the decision, for Lord *Kenyon* expressly resorted to them, according to the printed report of the case, and laid a peculiar stress on the circumstance, that there were *even* additional words in this case, *viz.* "leaving no issue behind him" which his Lordship said, *necessarily* import that the testator meant, "at the time of his son's death;" and he said, that the subsequent parts of the will also conveyed the same idea; for the devisor mentioned this event as likely to happen in the life-time of his widow, or of his younger son or daughters.

And it is material to observe, that his Lordship, in animadverting on the strangeness that would result, if the words "leaving no issue" had a different meaning when applied to real and personal property, speaks only with relation to such proposition, in reference merely to the force of language, to which extent his Lordship's reasoning seems to me perfectly just, without allusion to, or recollection, that this distinction is taken with a view to give force to a grand principle or rule of construction adopted, in the liberality of the courts of law, in order to favor the free alienation of property, which is in a degree impeded by this suspension of it, incident to executory devises and secondary uses. And, therefore, I think little doubt can be entertained, that

that whenever this point shall again meet a forensic discussion, this case will be considered as decided upon the words I have mentioned, as distinguishing it from preceding cases of the same nature, and plainly denoting the *intention* of the testator, to use the words in question in a contracted sense, and as referable to issue living at the time of the testator's decease; and to use the language of Mr. *Fearne*, speaking of this case of *Porter* and *Bradley*, in an opinion which called for his sentiments upon it, "it is impossible to reconcile one self to a supposition, that the court would, without such a ground of distinction, have dismissed all attention to the antecedent decisions upon the point."

But although, for the reasons I have mentioned, there is great ground to conclude, that the words to which allusion has been made, were greatly relied upon in the case of *Porter* and *Bradley*; and however the distinction in the cases preceding that case, and the strength of the rule "that an executory devise shall only be admitted from necessity," authorize the sentiments I have ventured to suggest, on the light in which that case will ultimately be considered; yet the strong terms in which the Chief Justice has expressed his opinion, deriving great weight from the high office which he fills, but still greater weight, from his great practical knowledge and extensive and profound legal erudition, leaves this point, until now considered as settled by practical conveyancers, in a state of doubt, which can only be removed by the *obiter dictum* of the same great authority, or by a judicial decision upon it.

And even the words "in default of such issue" may operate as a *descriptio personæ* as applied to real estates, where such construction favours the general intention of the devisor, and its application is equivocal, for then it shall be construed, by relation, to mean *issue* of the nature intended.

Thus in the case of *Doe* on the demise of *Comberbach* vers. *Perryn*, *Dougl. Rep.* 484. where one seised in fee (after bequeathing a leasehold estate to *R. P.* during his term and interest therein, and all his personal estate in manner therein-mentioned) devised the premises in question to his niece *D. C.* wife of *J. C.* for life, for her separate use, with a power of leasing, remainder to trustees to preserve Contingent Remainders, remainder to all *and every the children* of *D. C.* begotten or to be begotten on her body by his nephew *J. C.* *and their heirs for ever*, to be equally divided between and among such children (if more than one) share and share alike, but if only one child, then to such only child, and his, or her heirs for ever; and *for default of such issue* to *J. C.* for life, with power of leasing, remainder to trustees, to preserve contingent remainders, and from and *after the decease* of the survivor of *J. C.* and *D.* his wife, *without issue as aforesaid*, to and among all *and every the children* of his nephew *R. C.* and of *B. P.* respectively begotten, or to be begotten by them on the body or bodies of their respective wives, and to his niece *E. A.* *and to the heirs of such children of E. A. respectively in manner*

manner following; namely one third part or share thereof, (the same to be divided into three equal shares or parts) to the child or children of his nephew R. C. who should be living at his (the devisor's) decease; and if more than one, to be divided among them equally, share and share alike, and to the heirs of such child and children respectively: one other third part thereof to the child and children of his nephew B. P. and who should be living at the time of his (the devisor's) decease, and to be divided among them (if more than one) share and share alike, and to the respective heirs of such child and children of the said B. P. and the other remaining third part, to his niece E. A. and the heirs of her body lawfully to be begotten; remainder to his own right heirs for ever; with like power of leasing to R. C. and B. P. during the minority of their children, and to E. A. respectively, as was before given to D. C. remainder to his right heirs for ever. The will also contained a devise of other premisses specifically, and of all other the real estate of the devisor, to his nephew J. A. for life, remainder to trustees to preserve contingent remainders, remainder to all and every the children of J. A. equally to be divided between them, (if more than one) share and share alike, and to their heirs respectively, but if only one, then to such only child, and his or her heirs; and for default of such issue to and among all and every the children of his nephew R. C. and B. P. by their respective wives, and to his niece E. A. and to the heirs of R. C. and B. P.'s children, and his niece E. A. respectively in manner following, one third part to the child

and children of *R. C.* who should be living at the time of his (the devisor's) decease, and to the respective heirs of such child and children of *B. P.* and the remaining other third part to *E. A.* and the HEIRS OF HER BODY lawfully to be begotten, *remainder to the devisor's right heirs for ever*, with similar powers of leasing to *J. A.* and to *R. C.* and *B. P.* during the minority of their children respectively, and to *E. A.* and a devise of the residue and remainder of his estate real and personal to *R. C.* *B. P.* and *E. A.* share and share alike. The devisor died leaving *R. C.* his nephew and heir at law, who was also the heir at law of *J. C.* and of the children of *J.* and *D. C.* and under him the lessor of the plaintiffs claimed. *J. C.* and *D.* his wife were married in the life-time of the devisor, but had not any issue at the time of his death; but afterwards they had a daughter who died, and then another daughter who died without issue, and a son who died without issue. *J. C.* died, and then *D.* died, *E. A.* died soon after the devisor without having been married, and without doing any act to destroy the estate-tail limited to her by the will. The defendant claimed as one of the children of *B. P.*

The question was, whether the children of *D. C.* took an estate in fee simple, or in fee-tail, under this will? And that depended upon the construction given to the devise to *her children and their heirs for ever* "followed by the words" and for default of *such issue*. The ground on which the argument, so far as applicable to the question now in discussion, turned

turned on the part of those who argued in support of an estate-tail, was, that the words "and for default of *such issue*," ought to operate as referable to, and in restraint of the word heirs, in which case it would be an intail. But, on the other side, it was argued that those words could not be considered to operate in restraint of the word heirs; for the words "*such issue*" were referable to "children," and not to "heirs." That there were two descriptions of persons before-mentioned, namely the children of *D.* and the heirs of *D.* and the word "*issue*" was more applicable to "children" than to "heirs;" for children were issue, but heirs were not necessarily so. Therefore, as there were no subsequent words to restrain the operation of "heirs," that word must be taken in its strict legal sense; especially as it appeared from the rest of the will, that the deviser knew the effect of legal terms, and used technical words to create a fee in one part of the will, and an estate-tail in another. And the court decided on the latter grounds, that the children of *D.* took an estate in fee; for the words "for default of *such issue*" were referable to children and not to heirs, and meant the same "as for default of *such children*." And it was held that there was nothing to distinguish this case from those of *Lodington* and *Kime*, stated *supra* vol. 1, 293. and *Goodright* vers. *Dunham* stated *supra* vol. 1. 341. That the clear intent of the deviser, was that the children of *D.* if any, should take a fee; and if she had no children, then, that the remainders over should take effect: but *D.* had children, by which the limitations over were defeated.

Et vid. Longhead on the dem. of Hopkins vers. Phelps, supra 154, (note a) where the words "die without issue male" were construed the same, as without "leaving" issue male, on the context.

And a double contingency may be implied as to real property, to answer the *express* intention of a testator.

The case of *Baldwin and Carver*, stated in *Dougl. Rep.* 503. note 1, has been cited, as of this nature. This was a case sent out of Chancery for the opinion of the court of King's Bench. The material part of the case was, that *Richard Ashwin* after charging his real estate, with an annuity of 80*l.* to his wife for life, and giving her his household furniture, and giving 2000*l.* and 500*l.* to his nephew *John*, and several other legacies to different relations, devised his real estate subject to the said annuity, and all the rest and residue of his personal estate, to trustees (whom he also made his executors) their heirs executors and administrators, in trust, that they should stand seised and possessed thereof "to the use of the heirs-male of the body of his nephew *John Ashwin*, and in default of such issue-male, then to the use of the heirs-male of the body of his nephew, *Richard Ashwin*, and in default of such issue-male, then to the use of all and every the grand-children of his late brother *John Ashwin* and the grand-children of his late sister *Sarah Morris*, to hold all and singular the said lands and premisses to them the said grand-children of his said brother

brother and sister, and their heirs as tenants in common, and not as jointenants, and his said personal estate and effects to be equally divided amongst them share and share alike." By a codicil, bearing even date with the will, and attested by the same witnesses, stating that the testator had omitted in the will, "to dispose of the produce, interest and increase of the surplus and remainder of his real and personal estate" he directed that the trustees should pay all the interest, produce, and increase, that should from time to time arise, or be made, of his said real and personal estate, to his wife, and to his nephews *John* and *Richard Ashwin*, share and share alike, during their three natural lives, with survivorship between them. There were several children, some born after the will, and some after the testator's death. The question stated by the court of Chancery was; "whether all, or any, and which of the grand-children of the testator's late brother, *John Ashwin*, and of his late sister *Sarah Morris*, were intitled by the devise." The court as far as is material to the present question certified "that a doubt occurred whether the devise of the real estate, as it stood upon the will alone, was good; and, if it was coupled with the codicil, whether the absolute property in the personal estate, would not vest in *John*." But that notice having been given to the heir at law of the testator, and no person having appeared for him, the court proceeded to determine the question as between the grand-children themselves, without deciding the question as to the validity of the devise, as it stood on the will.

But in a subsequent case of *Doe lessee of Fonereau* versus *Fonereau*, which has been before cited by our Author, *vol. 1. page 448.* and is reported in *Dougl. Rep. 487,* the court of King's Bench expressly determined, that a double contingency might be implied to answer the clear and express intention of a testator.

In this case the testator, after reciting "*that he had settled his estate upon his eldest son Thomas for life*" from and after his (son's) decease gave and devised the same to the heirs male of his body, and in default of such issue, to his second, third, fourth and fifth sons in succession, and their heirs male, and for want of such issue, to the testator's right heirs. One question was, whether the limitations over to the second and other sons were not void, as executory devises, as being limited on too remote a contingency.

It was contended in support of the devise; that it might be considered as a devise of the reversion vested in the second son, *immediately* on the testator's death, with successive vested remainders over to the other younger sons; or, that if the devise to the second son was not immediate, it might be considered, either as an executory limitation upon the *alternative* of one of two events, *viz.* the event of *Thomas leaving issue male of his body*, or, that of his dying without *leaving issue male*; or, independent of that ground, as such an executory devise as, in all events, and which-ever of the two contingencies should happen, could not tie up the estate
from

from alienation, beyond twenty-one years after the death of a person *in esse*.

On the other side it was argued, that this could not be taken as a present devise of the reversion to the second son, subject to be divested, if *Thomas* should have a son; First, because the second son would take by purchase, and when that was the case, a vested estate was never divested again by any subsequent event. Secondly, Because the words of the will were all *future*, and nothing was meant to vest till after the death of *Thomas*. As to the double contingency, it was said that was contrary to the intention of the testator; that there was no case of a double contingency being *implied*, as to *real* property, unless where the *whole fee-simple* was disposed of by the first contingent limitation, so as if the first taker came *in esse* the whole vested in him. And that as a future executory devise it was bad, being on a general failure of issue.

Lord *Mansfield* previous to delivering the opinion of the Court, asked the counsel whether he had been able to find any case of real property, where the court on the words "*in default of such issue*" had implied a restriction to "*issue living at the death of the father*"; or, where a double contingency had been implied, *viz.* to the issue, if there should be any, and, if none, to the devisee over; and the reply being, that he had not met with any such case, His Lordship said "the case then lies in a very narrow compass. If the eldest son was tenant in tail,

tail, the recovery was good, and barred the limitations over; or, if the limitations over were too remote, the heir at law was entitled, for then the first limitation was an executory devise, which remained contingent till the death of *Thomas*, and the estate given to the second son was also executory, and being after an indefinite failure of issue, was too remote.

But afterwards Lord *Mansfield* said the court had decided that the devise to the second son was void, on the authority of the case of *Goodman v. Goodright* stated *supra* 336, 340. and 143 note (a), as reported by Sir *James Burrow*, but that they had seen a note of that case, taken by — *Kenyon*, (now Lord *Kenyon*) which assigned a different ground for the determination from that stated by Sir *James Burrow*. And the case was desired to be argued again.

And Lord *Mansfield* afterwards delivered the final opinion of the court to the following effect. "After the second argument, and upon consideration of the case, we were of opinion, and gave judgment accordingly, that either *Thomas* was tenant in tail, by connecting his estate for life, in the deed, with the limitation in the will, to his heirs male, (without saying it was our opinion that they could unite) or that the limitation over was too remote, as being after an indefinite failure of issue; and he could find no case where the court, in a will of real property, had raised an implication, to confine the failure of issue to the life of the ancestor. But, afterwards, turning the cases on this subject in our minds,

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and considering the reasons on which they proceed, namely, to *prevent perpetuities*, we stopped the judgment, and desired the case might be again spoken to. It has been argued a third time, and we have changed our opinion, and shall give our reasons. The rule is unquestionable, that there cannot be an executory devise after an *indefinite* failure of issue. But that is not the case here. We all think, that the estate for life being by one instrument, and the limitation in tail by another, they cannot unite, and that the heirs male of *Thomas* would have taken by purchase. This is a settled point, and we lay it down as our clear opinion. What are the limitations here? They are to the heirs male of the body of *Thomas*, and, in default of such issue, to the second and other sons. There are two ways, in form of law, in which this last limitation may take effect. First, if *Thomas* dies leaving issue male, then the estate to the second son takes effect immediately, as a remainder expectant, which may be barred by a recovery. 2dly, Suppose the other alternative (which really happened) that *Thomas* has no son, there it is an executory devise to the second son, if *Thomas*, at his death *leave* no issue. This is within the limits established by law to prevent perpetuities. An obvious objection to the alternative in this case is, that, if the limitation over is a remainder, it cannot be turned into an executory devise. *That* is true if *it ever vested as a remainder*. But here it might or might not vest upon a contingency. And his Lordship cited the cases of *Stephens* and *Stephens*, *Hopkins* and *Hopkins*, and *Brownswold* and

and *Edwards* as authorities, going along with the principles he had stated, and which enabled them to support the intention of the testator. As to that (he said) there was no doubt that he meant to give successive estates in tail-male.

The reader will observe that the above case was a determination grounded on the manifest intention of the testator to make an immediate devise, in which respect, the last case was distinguished from that of *Goodman* vers. *Goodright*, stated *supra* 336. the decision on which was in the last case rested upon the ground that the intention of the testatrix, was future and remote.

But a double contingency is not allowed where the remainder admits of being construed as vested, because, as the court never construes a limitation into an executory devise, where it may take effect as a remainder; so neither does it construe a remainder to be contingent, where it can be taken for vested.

Thus in the case of *Ives* and *Legge*, where *L.* devised to his wife *E.* and her heirs, all his freehold, leasehold, and personal estate, chargeable with legacies to his children, and, *inter alia*, with 200 *l.* to be laid out on a house, which he gave to his daughter *M. L.* to hold to her own use, during the term of her *natural life*, and, after her decease, then the same to go, and be enjoyed by *the children of her body begotten, and their heirs, and in default thereof,*

to his son *W. L.* his heirs and assigns, and soon after died. *W. L.* died in the life-time of *M.* but devised his interest to *J. A.* and then *M.* died without children. The question was, whether this devise to *W. L.* was good; which depended upon what estate he took under his father's will; whether a vested remainder, or a remainder depending upon the contingency, or possibility of *M.* dying without children. And *per* Lord Chancellor, this is a vested remainder in *W. L.*, *M.* took no more than an estate for life; for when an estate for life is expressly given, no greater estate shall arise by implication; (*) subsequent words of contingency, enlarging the estate only, where no *express* estate for life is devised. Then as to the children. The question is whether this be a limitation to them in fee or in tail? Had there been no remainder limited over, they would have taken a Contingent Remainder in fee; but there being a limitation to *their uncle*, it is impossible they should die without heirs, during his or any of his children's lives. The doubt arises from the equivocal words, "*in default thereof*" whether they relate to *M.*'s dying without children, or to the children's dying without heirs. If to the first, then they amount to the case of *Loddington v. Kime*, and make this a fee with a double aspect, or, as it is called in that case, two concurrent contingencies, of which either is to start, according as it happens, being remainders co-temporary, and not

(*) This rule has been since relaxed, in a variety of instances.

expectant

We may observe, that in all these cases of personal estates, where such restrictive circumstances as I have been instancing, appear, it matters not whether the term or other personal estate be limited to the first devisee or legatee *indefinitely*, as in the above cited cases of *Hughes v. Sayer* and *Forth v. Chapman*; or for *life* expressly as in *Target v. Gaunt* above cited; or to such legatee and *his heirs*, or *heirs of his*

expectant one after another. But then both will be contingent, as well that to the children of *M.* as that to *W.* which is a construction never made without an absolute necessity, as there was in *Loddington v. Kime*, stated *supra* 324, 339, 427. But here is no such necessity, the words "*in default thereof*" taking in both contingencies, as well that of *M.*'s dying without children, as of her children dying without heirs; which brings it to no more than the common ordinary limitations, in settlements, which take in all the contingencies that can happen. And as the court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the inheritance in abeyance; so neither does it construe a remainder to be contingent, where it can be taken for vested; because the latter tends to support the estate, and the former to destroy it, by putting it in the power of the particular tenant, to defeat the remainder by a fine or feoffment. In Chancery 1734, stated 3 *Durnf. and East Term Rep.* 494.

body,

body, or, *issue*, or *children*, as in the cases of *Lamb v. Archer*, *Read v. Snell*, *Lampley v. Blower*, and *Fletcher's case* (a), above cited
for

(a) A distinction seems to have been taken in the case of the Attorney General, on behalf of the Goldsmiths' Company of London against *Hall, Fitzgib. Rep. 314. Viner's Abr. tit. Devise 103. Pl. 50.* where a power of disposition over the whole is vested in the first taker, this shewing that the object of the testator is the personal benefit of the first taker, and controuling any inference arising from the word "leaving."

In that case one "gave and bequeathed all his real and personal estate unto his son *H.* and to the heirs of his body, to his and their use, to be paid unto him, in three years after the testator's death, and if his son *H.* should die *leaving* no heirs of his body living, then he gave and bequeathed *so much* of his real and personal estate, as *his said son should be possessed of* at his death to the Goldsmiths' Company of London. And the question was whether the limitation over of the personal estate to the Goldsmiths' Company was good. And the court consisting of the Lord Chancellor, Master of the Rolls, and Lord Chief Baron *Reynolds* were unanimous that the limitation over was void, as the absolute ownership had been given to *H.* for it was to him, and the heirs of his body, and the company were to have no

more than he should have left unspent; and therefore, he had a power, to dispose of the whole.

And the above distinction was adopted by Lord *Hardwicke*, in the case of *Flanders v. Clarke*, 1 *Vezey* 9. In that case *F.* by a clause in her will gave 150 *l.* to her son, the principal to be paid by her executors at such time, and in such proportions as they pleased; but that he should not dispose of it to any present, or future wife: but if he died without issue, then it should revert to the testatrix's family, and interest at the rate of 5 *l. per cent* to be paid by the executors for what should be in their hand, till the whole was paid. And the question was, whether the son should have more than an estate for life. *Et per Lord Hardwicke.* If the clause had rested on the first part, I should have thought it should go to him, as an usufructuary interest during life only, and then over; but the construction must also be on the other part of the clause, directing the executor to pay interest, till the whole was paid, which shewed the testatrix meant it for his personal benefit: ~~but~~ she had a view that he might die, before he made use of it, and therefore that he should not dispose of it from her family.

And in the above case Lord *Hardwicke* cited the before-mentioned case of the Attorney General, at the relation of the Goldsmiths' Company v. *Hall*, which he said was well reported in *Fitzgibbons*, and his Lordship said, that it was determined by Lord *King*, "that the first legatee had the absolute property,

perty, and therefore the devise over was void; for he had power to spend the whole, which was an absolute gift. I mention this circumstance because it removes any doubt upon this case founded on the low estimation in which the reporter stands.

And here we must be careful to distinguish the above cases of the Attorney General and *Hall*, in which the decision turned on the inference afforded by the power of disposition, that an absolute property was intended to be given, from cases where the testator vests a mere power of specification, in the first legatee, by confining him to particular objects.

The case of *Gordon* vers. *Adolphus*, 6 Bro. Parl. Ca. 354. appears to me to furnish the distinction to which I am now alluding.

In this case one possessed of a considerable personal estate (among other things) gave and bequeathed as follows, "The whole of my estate that I shall be possessed of, I leave to my wife during her natural life, that is to say, so long as she shall continue unmarried; but in case she shall chuse to marry, then and in that case, of all the residue of my estate, an account shall be taken, and all above, &c. shall be directed for the immediate use and behoof of my daughter, meaning the interest and produce thereof. It is also my direction that no husband my daughter shall marry, shall have any power whatsoever;

Q 2

that

that her receipt from time to time shall be a sufficient discharge, &c. In case my daughter shall die, which God forbid, without leaving issue; in that case, it is my will and desire, that what my estate shall produce shall be divided among the children of my late sister; *notwithstanding what I here mention, is only in case my daughter shall die without a will*; but this shall not be any hindrance, in case she shall make her will properly attested, she may, in that case, give it to those of my nephews that shall deserve her favour most, but not out of my family. The testator's daughter died intestate and without issue, and the children of the testator's sister claimed the residue of his personal estate, and exhibited their bill in Chancery to recover it, and had a decree by Lord Camden in their favour, from which an appeal was made to the House of Lords. And it was contended that the daughter took an absolute interest, and the limitation over was void. For the bequest to the daughter not being accompanied with any words of limitation, the absolute interest must thereby pass, unless a limitation could be raised by implication to confine it to an interest for life. But implications were never raised, unless in favour of the person to whom the estate was given, and no implication ought to be raised in favour of remote relations to the prejudice of an only daughter. The limitation to the family of the testator's sister, upon the death of the daughter *without leaving issue*, was also void; upon the ground of being on too remote a contingency; for the words dying without issue, and dying without leaving issue, must, in the intention of

of the testator, mean the same thing, viz. a failure of issue at the time of the death. The rules of law, on principles of general policy, had determined a limitation of personal estate after *dying without issue* to be void; and the same principles equally extend to limitations after *dying without leaving issue*. And there was no case, in which words of implication, instead of giving an estate, had been applied to restrain the general interest, passing under the express limitation of the will. On the part of the respondent it was insisted, that the testator meant to dispose of his whole estate and not to die intestate as to any part of it. He had given it to his wife during her life, or widowhood; after her death, or second marriage, he devised it to his daughter absolutely, in case she should have issue; but if she should *leave* no issue, then it was given to the family of the sister; and it was manifest that the contingent devise over to them, referred to the time of the daughter's death, because the testator had enabled her so far to defeat it, as by making a will, which must take effect at her death, to distribute it unequally among the objects of that devise, and even to exclude some of them, provided her disposition should be made within the circle of the testator's family. That the devise in favour of the respondents depended merely upon the contingency of the daughter's leaving or not leaving issue, at the time of her death; an event which the law would expect, and not consider like the general failure of issue at any uncertain distance of time, as too indefinite and remote. And the appeal was dismissed, and the decree affirmed.

for the restriction it seems is equally valid under any of those circumstances, and gives effect to the limitation over.

A diversity has in some cases been contended for, between a limitation of a term, by such

So where one after directing the payment of his debts and funeral expences, gave as follows "As to all the rest and residue of my estate and effects, whether real or personal, I give the free enjoyment thereof to my brother *L.* whom I constitute my sole and universal heir, and without any restriction as to his children, to whom he shall leave, before or after his death, such part of my inheritance as their conduct may deserve: but if at the death of my brother *L.* there shall be no children left alive, and that all his children shall be dead without issue, in such case I give, bequeath, and leave the said residue to *A.* or in default of him to his children in equal shares." *L.* claimed the absolute interest in part of the testator's *personal* estate, which was invested in Bank stock. And on his behalf it was contended, that the meaning of the will was, if *L.* should die without issue, and without making any disposition, then it should go to *A.*; otherwise it would defeat the power. But the Chancellor thought that the gift over was an executory devise, and if it took place, would defeat the interest of the children. And his Lordship afterwards decided against *L.* *Lieuland* vers. *Agassiz*, 2 Bro. Rep. Chan. 615.

words

words as in the case of a real estate would give an *express* estate-tail, and a limitation of the same by such words, as in the case of a real estate would only give an estate-tail by *implication*; upon this principle; that where the words of a will, if used with regard to an inheritance, would give an *express* estate-tail, there the same words applied to a term will pass the whole interest in that term; but that, where the words of the will, if applied to a freehold, would give an estate-tail by *implication* only, there they will not enure to give the whole interest in the term; and consequently, that where a term is limited to one, and if he die *without issue*, remainder over, this limitation will not vest the whole term in him, as a limitation to the *heirs of his body* or to *his issue* would do; but are always to be understood restrictively, and to relate only to his dying without issue *living at his death*, and therefore give him the term only during his life.

Vide 1 P. W.

433.

3 P. W. 260.

(364)

The ground of the distinction is this; in respect to an inheritance, the words, *dying without issue*, are taken to mean an indefinite failure of issue, in order to create an estate-tail in favour of the issue; who are capable of taking *an inheritance*; but with respect to a

Vide 1 P. W.

667.

Q 4

term,

term, such a construction cannot benefit the issue, because *a term* cannot descend to them. In some instances, it is true, the court seems to have countenanced a distinction of this sort; as appears in *P. W.*'s reports of some of those cases which I have last cited from him; but in all those cases, as I have before noticed, there were some circumstances in the will, which the court observed confined the generality of the expression, *dying without issue* to *dying without issue then living*. This appears in the reports of the respective cases, except in that of *Forth* and *Chapman*, in which *P. Wms.* does not notice the court's regard to the particular penning of the will. But Lord *Hardwicke* it seems in the case of *Beauclerk v. Dormer* observed, that *he* was counsel himself in that case of *Forth* and *Chapman*; and that by the note he took on the back of his brief it appeared, that Lord *Macclesfield* laid a good deal of weight on the words, and *leave* no issue. And again in the case of *Sheffield v. Lord Orrery* it seems Lord *Hardwicke* said that Lord *Macclesfield* decreed the limitation in *Forth v. Chapman* good upon the word *leave* no issue; and in the case of *Garth* and *Baldwin* it was again observed, that in *Forth* and *Chapman* the court went on the word *leaving*.

(365)

Forth v.
Chapman,
vid. supra.
p. 362.
2 Atk. 313.

3 Atk. 288.

2 Vez. 649.

It

It is obvious, that if the court had grounded their decisions on the distinction I am speaking of, it would have been needless to have inquired into, or insisted upon those circumstances of restriction, upon which, in delivering their opinions, they laid so much stress. Besides, where no such circumstances have appeared, it has been determined, that the limitation of a term over after a *dying without issue*, even in such cases where the limitation could only have given an estate-tail by implication in a real estate, is to be taken in the legal extent of the expression; and therefore the limitation over being (in that sense) too remote, is utterly void. This appears in the case of *Love and Wyndbam* before cited, where the first limitation was not even indefinite, but was expressly restrained to the life of the legatee.

(366)

Supra, p. 342.

So where a lessee for 1000 years without impeachment of waste, devised to *L.*, and if he should die without issue, then to *B.*; the court held that the remainder was void, and that the whole vested in *L.*, his executors and administrators.—And where a personal estate was devised to *A.*, and in case she should die without issue, then to *B.*, it was resolved

2 Freem. 210.
Burford v.
Lee.

2 Freem. 287.
anon.

resolved that the devise over to *B.* was void, and the whole decreed to *A.*

Fitz. Gibb.
68.
Green v.
Rod.

Again in a later case, where *A.* possessed of a personal estate, appointed by will, that it should be sold, and the money arising from the sale be to the use of his sister *M.*, and if she should die^s without issue, it should go equally between his other sisters; and in a subsequent clause it was said, *then after the death of his sister M. in manner aforesaid, &c.* There it was contended, that although the first limitation to *M.* contained nothing to restrain the generality of the meaning, *of dying without issue*; yet the words in the subsequent clause *then after the death* amounted to a restriction, which confined it to a dying without issue *living at the death of M.* But the court observed that the words in *manner aforesaid*, prevented such a construction; because they referred to the first limitation, and were tantamount to a repetition of it; which being a dying without issue generally, the limitation over was too remote, and therefore void.

(367)

These authorities directly overturn the distinction above mentioned in both its points, *i. e.* as well in respect to the validity of the subsequent

subsequent limitation over, as in regard to the whole not vesting in the first devisee or legatee.

And though Lord *Talbot* seemed to admit the distinction in the case of *Atkinson v. Hutchinson*, yet it was only by way of auxiliary argument; he by no means appears to have founded his opinion or decree in the case upon it; nor indeed was there any call for it; for the words there, were, without *leaving issue*, the import of which I have considered; and in regard to which words Lord *Talbot* observed, the case of *Forth* and *Chapman* was in point, as there could be no difference between the words *without leaving issue*, and *leaving no issue*; he founded his decree therefore upon the precedents in point. And it is further observable, that in *Atkinson v. Hutchinson* there was a preceding limitation upon the death of any of the children without *leaving issue*, to the *survivors* of them; now this strictly was not applicable to an indefinite failure of issue, because confined to a *survivor*; and it was but reasonable to give the same words the same construction in the subsequent limitation, which they must bear in a limitation immediately preceding, applied to the same subject.

Atkinson v. Hutchinson,
supra 359.

(368)

And

2 Atk. 308.
Beauclerk v.
Dormer.

And so in a case of later date, where the testator said, M. D. *I make my sole heir and executrix, and if she die without issue*, then to go to L. B. Lord Hardwicke held, that no authority came up to supporting the point, that *ex vi termini* such a limitation of a personal estate should be confined to a dying without issue *living* at the death of the first taker; and that as the limitation was general, and not restrained by any circumstance in the will, the devise over was void. And his Lordship was of the same opinion in a subsequent case, when he said, "Where there is a devise of a lease for years to a man, and if he die without issue, remainder over; there is no doubt but the whole interest vests in the first taker."

2 Atk. 376.
Saltern v.
Saltern.

Jan. 1768.
Keily v.
Fowler.

*the now Lord
Ch. J. Wilmots
the Argum.
on delivering
the opinion
of the Judges
in this case
to the Lords.
(369)
page 290.
of his Opin.
& Judgm.*

Indeed, since the case of *Beauclerk v. Dormer*, there has been the case of *Keily v. Fowler* determined in the House of Lords, upon an appeal from the court of Chancery in Ireland: where W. C. left and bequeathed, unto his daughter and only child, all his wordly substance, lands, stock, corn, debts, and household goods, provided she married by the consent of his executors therein mentioned: but in case she married without the consent of his executors,

tors, she was to have only twenty cows and a horse for her whole fortune : and after naming *A.* and *B.* his executors, he appointed, that in case his said daughter should die *without issue*, all his said substance should *return back to his executors*, to be distributed as he should thereafter direct. — And lastly in case his daughter should marry without consent, or die *without issue*, he appointed that all his said substance, &c. should return back *to his executors* to be *by them* distributed in manner following; *viz.* to his nephew *J. D.* 100 *l.* to *H. G.* 50 *l.* to each of his *executors aforesaid* 50 *l.* to his daughter twenty cows and a horse only, and the remainder to be equally divided amongst the children of his sister *E. F.*

The question was, whether the limitation over of the personal estate after the death of the testator's daughter *without issue* was good? The court of Chancery in *Ireland* held it was : and their decree was confirmed by the House of Lords here, upon the opinion of the Judges, that the bequest over was to take effect on the death of the daughter without *issue then living*.

(a) Now

(370) (a) Now in this case, we may observe, a circumstance admitted in construction as restrictive of the general import of the words *die without issue*; which was, the supposed reference of the word *executors*, and then in the *defection by her marriage without consent or death without issue* that the estate should *return back to his executors*, to be distributed by *them* to the two executors named in his will, because after, upon the same event, he gave to *each of his executors aforesaid* 50*l.* Therefore this was considered as a *personal* trust in those particular executors, to be performed by *them*, after the determination of the first estate by either of the two events, of his daughter's marriage without consent, or her death without issue. And taking the case in that light, suppose the testator to have considered both these events to be such, as if they happened at all, would in all probability happen in the life-time of his said executors, or one of them; otherwise we make him repose a trust in his executors, inconsistent with a probability of their living to perform it.

(a) This passage is altered by Mr. *Fearne's* manuscript.

As

As to any thing that might be inferred from the devise over to his sister's children being intended as a *personal provision* for them, as much may in all cases be inferred from a devise over to any relation or other person; and therefore seems to be of no weight. (371)

(a) "*Indeed the very circumstance I have noticed, and which seems to have been the principal ground of the decision has been since treated as trivial; but when we consider the avidity of our courts to lay hold of any circumstance, however slight, to support these limitations of personal estates, and compare this with the distinction so often taken for that purpose, between dying without issue, and without leaving issue, and other almost imperceptible shades of distinction in some of the cases I have cited, I think it may be deemed no violence of common sense to allow this a place, at least, in the middle class of them, and the nature of the chattels to be given to the daughter in the event of her dying without issue, (viz. cows and horses) was not suitable*

(a) The following passage is taken from a MSS. note of Mr. Fearn's intended to be introduced here.

" to

"to the supposition of an indefinite failure of
"issue (a).

I therefore

(a) The observations of Mr. *Fearne* inserted above in Italicks, and which appear to have been intended to be placed here, were occasioned I apprehend by a remark made by Lord *Thurlow*, in the case of *Bigge* *vers.* *Bensley*, as that case is reported 1 Bro. Rep. Chan. 190. "that it would be better sense to say that in *Keily* and *Fowler*, there was no rule of construction, than *Mt. Fearne's*."

But this ground of decision is not imputable to Mr. *Fearne* alone, for it was expressly and solely relied upon in the case of *Hughes* *vers.* *Sayer*, stated *supra* 358.

And the case of *Balguy* *vers.* *Hamilton*, *Moseley's Rep.* 186. stands upon the same ground. There *H.* directed that his personal estate should be sold, and turned into money, and put out at interest; that his wife *Ann*, should have 30*l.* a year out of the produce of it, and that, when and so soon as his only daughter and child *Ann*, should attain her age of twenty-one years, then his wife should have 25*l.* *per annum* instead of 30*l.* Then the will goes on, *item*, I give and bequeath to my daughter *Ann*, all my personal estate whatsoever, she paying the said 30*l.* a year, and the legacies therein bequeathed, and I make my wife her guardian, and she is to receive the residue of the interest, maintaining my daughter

daughter thereout, but if my said daughter die before her age of twenty-one years, then my will is that my wife shall have 400*l.* and that on payment of the same, she shall give a discharge for her said annuity, and that then and immediately from and after my said daughter's decease "*without issue of her body,*" I give and devise all my personal estate to my brother J. H. *he paying* the said sum of 400*l.* to my wife, if then living. The testator died, and Ann, the daughter died an infant without issue, and then the wife died. And the only question was, whether the devise over to the brother was good, or whether the whole personal estate vested in the daughter? *Et per curiam*, A devise of personalty, after a dying without issue is *certainly* void; and it is as certainly good after a dying without issue in a limited time; now the words of this will can bear no other construction, but if the daughter die without issue before twenty-one. First the whole estate is devised to the daughter, and the whole interest to the wife, part as an annuity for herself, and part for the daughter's maintenance. The first contingency is general, if she (the daughter) die before twenty-one years of age the wife is to have 400*l.* but who is to pay this 400*l.*? The brother, so that the latter words must have the same construction, and the will is to this purpose, if my daughter die without issue before twenty-one, my brother is to have the whole estate he paying my wife 400*l.* the wife is to have the 400*l.* if the daughter die under twenty-one, and the brother being to pay it, if she die with-

out issue, the estate must come to him at the same time, as a fund out of which it is to be paid.

So in the case of *Smith and Fisher*, 2 Rep. Chan. 187, where one, after several legacies, gave all the rest and residue of her estate to be put forth to interest by her executors, and one half of the interest to be paid to *A.* her sister, during her life, and the other half of the interest unto *B.* daughter of the said *A.* and she after her mother's death, to have all the interest during her life; and if *the said B. died "without issue of her body,"* then the principal of the residue to be equally divided between *C.* and *D.* The question was, whether the devise over to *C.* and *D.* was a good devise? And the court declared that the limitations over to *C.* and *D.* were good. In this case the bequest is, in the direction to divide, and therefore personal to *C.* and *D.*

And the true principles upon which these cases turn, are fully laid down by the court, in the case of *Lyde* vers. *Lyde*, 1 Durnf. and East Term Rep. 593.

In that case one possessed of premises for a term of years, gave them by will to his son *G. L.* for life, and after his decease to *M.* his wife for life, and after the decease of the survivor, to the children of *G. L.* share and share alike; but if *G. L.* should die "without issue of his body," then to his son *R. L.* for life, and after his decease to *N.* his wife, with divers limitations over; *M.* died, and then *R. L.* and the

the question was, whether the limitation to *N.* was good? *Et per Ashhurst, J.* There has been a variety and contradiction of determinations upon this subject: but the *general principle* that governs these kind of cases is this; where there is an *express limitation* of a chattel by words, which *if applied to a freehold*, would create an *express estate-tail*, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect. But where there is no such *express legal limitation*, the court will consider the intention of the testator. Here there is no such legal limitation, and the intention of the testator is evident. There is not such a limitation as *must*, in its legal operation, constitute an estate-tail. Then it is open to us to consider the intention of the testator. And of that there can be no doubt.

Justice Buller said. If this will be read in the manner in which it ought to be, and which is the true way, as laid down by Lord Chief Justice *Wilmot* in the case of *Keily and Fowler*, viz. to read the words of the will with reference to the rules of law, it cannot admit of any doubt.

Two distinctions have been taken in former cases, which, if they hold, will govern the present. The first is, that in the case of a bequest of a term or chattel, the words "dying without issue" shall be considered with a double aspect, comprising two contingencies; the one, *if the person die without leaving issue*, the other if he die leaving issue, which after-

wards die without issue. Now unless that rule be exploded, it will decide the present case; the contingency, on which the limitation was to take effect, having happened within the time limited.

The second distinction, which was taken by Lord *Macclesfield* is between an *express* and an *implied* estate-tail, in the case of a bequest of a term: whether that distinction has been shaken, or whether it was wise to depart from it after it became a rule, it is unnecessary now to determine (*). Because, in this case, upon the face of the will, the intention is plain; and if the intention of the testator is clear, there is no case in law, which says, that the intention shall not prevail.

As to the argument, that if this had been a devise of a freehold, the words would have created an estate-tail, and therefore, that when applied to personalty, the whole interest vests in the first taker: if the foundation of that argument fail, there is an end of every thing which is built upon it. Now in my opinion nothing is so clear as that, if this had been a devise of a freehold, it would not have given an estate-tail. It is to *G. L.* and after his decease to *M.* his wife, and after the death of the survivor of them, to their children *share and share alike*. But an estate-tail, is to a man, and the heirs of his body, in *succession*: that is not the case here; for by the express words all the children are to take *equally*: and to do that, they must take as purchasers.

(*) *Vid.* Observations on this subject *infra* note.

But this being a bequest of a term, I shall again have recourse to Lord Ch. Just. *Wilmot's* doctrine in *Keily* and *Fowler*, where the words were "heirs of the body" and he there said "the truth is, we are bound, to an artificial and technical sense of those words, unless there is an *apparent intention* in the testator, of using them in their natural meaning and for that purpose which is in favor of common sense, the MOST TRIFLING CIRCUMSTANCE IS SUFFICIENT."

In that case the words "heirs of the body," though strict legal words of limitation, were controuled by very slight circumstances indeed. In this case the circumstances are very strong. The testator has given to the children the interest of these premises *share and share alike*, (*) that is, for ever. So that the contingency, upon which the limitation over is founded, could only be *in case there were no children*. As to the real intent of the testator, it is evident, if it were only from the circumstance of the remainder over to *R. L.* being *for life*, that the testator meant the limitation must take place, if at all, within the scope of a life in being, which intirely excludes the idea of an indefinite failure of issue. In a very full note of *Keily* and *Fowler*, which I have seen, where stress was laid on the circumstance of the limitation over being, to the executors named in the will, and that the event looked to was likely

(*) This construction of the words "*share, &c.*" is only applicable to personalty.

to be within their life, it was said, "we are not to consider of *legal consequences*, of *legal representations*, but only *what the testator meant* by giving it to his executor." In this case it does not require so much reasoning, because the testator has expressly given the estate to *R. L. for life*, in the event of *G. L.* dying without issue, which shews that the testator looked to the event of *G. L.*'s dying without issue *at the time of his death*.

Again in the case of the Attorney General at the relation of the Chaplains of the New Church at Totenham *vers. Bayley*, 2 Bro. Rep. Chan. 553. where one seised in fee of certain estates, and also of part of a tenement called *A.*, and possessed of other parts of the same tenement called *A.* for a long term of years, made his will, and after devising so much of the estate as was freehold to trustees, their heirs and assigns, and so much whereof he was possessed for a term of years to his executors, &c. declared that as concerning *those parts called M. and B.* whereof he was possessed of a long term of years his will was, that his brother *W. T.* should have the use thereof, &c. for so many years of the term as should expire in his life-time, and after his decease, his will was that his executors should permit, all and every the child and children of the said *W. T.* their executors, &c. respectively, to hold and enjoy the same for his and their proper use, during the remainder of the said term, *in such manner as the said W. T. should, by his will or deed in writing, &c. direct, and for want of such appointment, then equally, share and share alike,*

alike, without benefit of survivorship; but if it should happen that the said *W. T.* should *die without issue*, in the life-time of the said *J. T.* and *T. T.* or either of them, then his will was, that the said *J. T.* and *T. T.* if they both survived the said *W. T.* *dying without issue as aforesaid*, should equally have the benefit and advantage thereof for so many years of the term as should expire in the life-time of the said *J. T.* and *T. T.* and if only one of them should happen to survive the said *W. T.* *dying without issue as aforesaid*, or if both should happen to survive the said *W. T.* so *dying without issue as aforesaid*, and one of them should happen to die before the other of them, leaving issue behind him, then the testator's will was, that such survivor should have but one half of the benefit and profits of the said leasehold premises, and the other half should go to be divided among all and every the child and children of him so dying, share and share alike, during so many years of the term as should expire in the life-time of the said *J. T.* and *T. T.* and, if he so dying should leave no issue behind him, the testator's will was, that the benefit thereof, should devolve upon the survivor, for so many years of the term as should expire in the life-time of the survivor, and after the decease of the survivor of them the said *J. T.* and *T. T.* (in case they or the survivor of them should survive the said *W. T.* *dying without issue as aforesaid*) the testator's will was, that all and every the child and children of the said *J. T.* and *T. T.* (though one of them might or should happen to die before the said *W. T.* *dying without issue as aforesaid*)

said) and the executors administrators and assigns of such child and children should have the said leasehold premises, share and share alike, for and during the remainder of the term, and "in default of such issue," "OR IF THE SAID *W. T.* SHOULD HAPPEN TO SURVIVE, AND DIE WITHOUT ISSUE," after the death of the said *J. T.* and *T. T.* then the testator's will was, that the said leasehold premises should go to and be applied towards the benefit of *T.* New Church and charity school as aforesaid. The testator died. *W. T.* died unmarried and without issue. *J. T.* and *T. T.* both died *in the life-time* of *W. T.* *T. T.* without issue, and *J. T.* leaving issue one daughter *M.* The question was whether *W. T.* having survived *J. T.* and *T. T.* and died without issue, as in the last limitation mentioned, the premises, on his death, became subject to the charitable bequest, for the benefit of *T.* Church and school. The cause was first heard at the Rolls, when his Honor was of opinion, upon the construction of the will, that the interest of the testator was not well disposed of thereby in favor of the charity. From this decree the charity appealed.

And in support of the appeal it was argued that an express estate for life, being limited to *W. T.* with a power of appointment among his children, with a limitation in default of appointment, to his children, equally share and share alike, the word *issue* was explained by the words *child or children*, and meant throughout the will, to child or children, so that the testator gave upon a double contingency. First if *W. T.* died without children, living the *T.*'s, then
he

he gave to the *T.*'s if *W. T.* survived the *T.*'s and died without children, to whom the testator had given *eo nomine* as children, then he gave to the charity; both the events happened, therefore the gift to the charity was good.

It was contended in support of the decree, that the limitation over, was too remote. A gift to *A.* and if he die without issue to *B.* the remainder must be too remote, unless there were words in the will, to control the general sense of the words "*if he shall die without issue.*" That there was nothing in this will to require, that the words should have a different sense.

Sed per Lord Thurlow Chancellor, If a man gives an estate in general to *A.* for life, and adds, "but if he dies without issue, I then give it to *B.* *B.* has no immediate gift, but only a contingent interest upon *A.*'s dying without issue; and it would counteract the intention of the testator, if *B.* took it immediately upon the death of *A.* therefore *ex necessitate rei*, the true argument, in both *real and chattel interests*, is that in fact these words operate to an enlargement of the estate *for life*, for otherwise the issue of *A.* would not take at all, and *B.* would take the whole; and therefore the necessary implication must take effect, namely that *A.* should have an estate, which must devolve upon his issue. Upon that ground, the court has extended the estate beyond an estate for life, and in a freehold interest has deemed it an estate-tail, and in chattel interests an absolute property;

perty ; but *that* arises from the necessity of the construction.

In this case after an express estate for life to *W. T.* (so that he may take as a purchaser) the testator proceeds, &c. (stating the limitations in the will,) here no such necessity arises from the words "dying without issue" as the words are referable to dying without issue, *so provided for*. It is so well settled that no dispute could arise. If the *T.*'s had no interest, that they could take, it would go to the charity. In the events which have happened, this case results to the ordinary one I have stated, and the charity must have a decree." And the decree at the Rolls was reversed.

There is an obscurity in the mode of expression used by the court in this case as reported, *viz.* "dying without issue *so provided for*." But if I conceive the sense in which the expression, *so provided for*, is used, it means "so provided for by the power of appointment," that is that dying without issue, meant *such issue as A. might have appointed*, which must be intended issue then living, in which respect this case resembles that of *Target and Gaunt*, stated *supra* page 358.

I shall now take notice of the case of *Bigge* *vers.* *Bensley*, 1 *Bro. Rep. Chan.* 190. which happened prior in time to the case last stated, and in which Lord *Thurlow* is reported to have rejected the reason alleged by Mr. *Fearne* (and which was relied upon by Lord Ch. Just. *Wilmot*, in the case of *Keily* and *Fowler*, as materially influencing that decision, and which

which seems to be favoured by the cases I have added) as not sufficient to support the judgment.

In this case one bequeathed all his personal estate to his wife *F.* to hold to her, *her heirs executors administrators and assigns* for ever, and appointed her sole executrix, *but in case of the death of F. without issue*, then he gave the whole to the *eldest* son of his brother *R.* his heirs, executors, administrators and assigns, and if there should be *no such son*, then to his said brother *R.* The wife survived the testator, and died without issue. And the question was, whether the devise over, was valid? It was contended in support of the devise over, that the "dying without issue" was not general, but controuled by the event of having no son, in which case the devise was in favour of *R.* himself; that therefore if the testator meant a dying without issue, indefinitely, it could not affect the son of a person then living, much less that person himself. Therefore the event must be decided on the death of *F.* when if he, *R.* had a son it would vest absolutely in that son, if not, it would vest in *R.* *Et per Lord Thurlow*, The first question is, what, *abstracted from little points and circumstances*, would be the effect of the gift to *F.*? There was not a single case, not even that of *Atkinson and Hutchinson* stated (*supra* 359.) which did not hold that *such a limitation after these general words was too remote*. His Lordship should only notice *Dormer* *vers.* *Beauclerk* *. The general words were to be varied only by *circumstances arising upon fair demon-*

* *Vid. supra* 368. this case stated.

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stration. To call dying without leaving issue, the natural sense of dying without issue, was against all the cases. In this case there was no circumstance which had occurred in the others. In *Dormer* and *Beauclerk*, it was held, that the word *then* could not, and never did make the difference. It was merely a word of relation, not an adverb of time. Upon Lord *Hardwicke's* authority, he must hold the word *then* did not make a difference. As to the gift to the brother, *Dormer* and *Beauclerk* was a stronger case as to that point. It was argued there, upon the circumstance of the 5000*l.* being meant as a portion; that being a maintenance, and given after a dying without issue, it must mean dying without leaving issue.

There appears to have been a circumstance in the case last stated, which materially distinguishes it from that of *Dormer* and *Beauclerk*, as to the effect of the gift to the brother; and which seems to me to have intitled that circumstance to greater weight, in the last case, as developing the intention, than the gift of the 5000*l.* to Lady *Diana Beauclerk* in that case; I allude to the different mode in which, in the case of *Bigge v. Bensley*, the bequest to the son of *R.* was made, from that in which the bequest to *R.* was made, in that case, the former being given to the eldest son, *his heirs executors administrators and assigns*, the latter to *R. without any words of limitation annexed*; which in a case of a nature, to use the words of Lord Ch. Just. *Wilmot*, in the case of *Keily and Fowler*, and repeated and adopted by Mr. Just. *Buller* in that of *Lyde v. Lyde*, stated *supra* 242. in this note,

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in which “we are not to consider of legal consequences, of legal representations, but only what the testator meant” and “where, the most trifling circumstance is sufficient” to shew an apparent intention to use such words in their restricted sense, as issue *then* living; for this difference in the mode of giving, seems to me to shew an apparent intention that the limitation over in case of the death of *F.* without issue, was to take effect in the life of *R.* the limitation over to him being *personal*, no words being introduced to carry it to *his heirs, executors, administrators or assigns*, and which were inserted in the preceding limitation to his eldest son; for Lord *Hardwicke* admitted in the case of *Dormer and Beauclerk*, that if the 5000 *l.* “had been to be construed as merely personal to Lady *Diana*, and by way of provision as a portion, and not to arise unless she survived Miss *Dormer*, then, a strong argument might have been drawn from thence, to shew the testator’s meaning was to confine the dying without issue of Miss *Dormer*, to the time of her death.” But his Lordship said, that this being annexed by way of condition to Lord *George*’s legacy, made it a vested legacy, and transmissible, though not payable till a future time, which took away all the argument that might be raised from its being personal to her only, for a death before the contingency happened would defeat the legacy. So that Lord *Hardwicke*’s reasoning turns upon whether the circumstances or phraseology are sufficient to shew that the testator meant the limitation over to be *personal*; and therefore, if the circumstance to which I have alluded in the case of *Bigge and Bensley*, be sufficient to shew that

that the limitation to the father, was intended to be personal, from the circumstance that the testator had shewn an apparent intention, by omitting the words *heirs and administrators*, in the limitation over to the father, and annexing them to the limitation to the eldest son, it brings the case within Lord *Hardwicke's* reasoning; and though Lord *Parker* in the case of *Pinbury* vers. *Elkin*, stated *supra* 359. did rely upon the words "then after" being tantamount to "immediately after" as the strong part of that case; his Lordship resorted also to the circumstance, that the 80*l.* there given was *personally* intended for the legatee, who must be supposed to be dead, *by the time there should be a general failure of issue*. And yet, in this case Lord *Parker* decided that the 80*l.* would go to the executors of the legatee, who was dead, which was a point not before settled; *viz.* that possibilities would go to the personal representatives.

Many cases may be found, in which the insertion or omission of words or sentences, in themselves superabundant, because expressed before, may nevertheless materially affect the construction of language, and be drawn into aid that side of the question which favors the intent. Thus Lord *Hardwicke* in the case of *Lowther and Condon*, 2 *Atk. Rep.* 132, on a question, whether a portion should sink into the inheritance of the land charged therewith, or go to the representative of the person intitled, observes "that the manner in which the clause is worded, shews the intention of the testator extremely plain; and as there is so clear an indication of the intention, I may
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(his Lordship says) and ought to lay hold of a strong reasoning to be drawn from the words "*executors administrators and assigns*," for the meaning was that in case the daughters should die, before the portion was raised, that the executors should be intitled to have the money raised." And Lord Talbot in the case of *Bradley vers. Powell, Ca. Temp. Talbot 193.* which arose on a question of the same nature, held that the portion sunk on the death of the person entitled, and urged as one ground, for its not being transmissible, that it was not payable to the son *his executors and administrators*, but barely to himself. And yet the annexation of words of transmission are unnecessary in respect of personal property, as it passes absolutely, though *executors* or *administrators* are not named, for it passes to them barely as representatives. And where cases turn upon minute circumstances, a variation of expression furnishes a strong presumption of a variation of intention; which was much relied upon in the case of *Baddely v. Leppingwell, 3 Burr. 1533.* Where a testator devised one estate to *A.* for and during the term of his natural life, paying thereout, &c. and after the decease of *A.* then over; and gave and bequeathed another estate to *B.* she paying thereout, &c. Mr. Just. *Wilmot* laid down this general position, "that the intention is to be collected from the whole of his will, *ex visceribus testamenti*; so as to leave the mind quite satisfied, what the testator meant; he collected the intention of the testator, first from the devise to *A.* and then from the devise to *B.* The testator devised to *A.* expressly, for and during the term of his

his natural life, and after his decease to *D. E.* and *F.* But in the devise to *B.* he omitted the words "for and during her life," which words it must be supposed he would have inserted in case he had intended to give her only an estate for life, because he had just before done so, in the preceding devise to *A.* It was plain, that by giving it to *B.* generally, without adding any restrictive words, as the deviser had before added to the devise to *B.* that he meant to give *B.* the absolute property. And the same mode of reasoning, it should seem, is applicable to the case of *Bigge* and *Bensley*, in which it may be contended that the inserting words of transmission in the bequest to the son, and omitting them in that to the father, shews that the bequest to the father was intended to be personal, and if so, though the legal effect would be otherwise, such words not being necessary to give transmissibility to the property, it would be sufficient to denote the intention. *Et vide Donne v. Merryfield, supra* 358. note (a).

But the decision in the case of *Bigge* and *Bensley*, does not affect the ground on which the decision in the case of *Keily* and *Fowler* stands, except so far as the general observation of the Lord Chancellor in the former case extends, and which, I speak with deference, appears to me, on a full inspection of the cases, rather a hasty expression on the spur of the moment; for the reason on which *Keily* and *Fowler* is rested, does not turn merely on the ground of the provisions there being personal to the children of the testator's

testator's sister, but on the direction that the property should return to the executors, to be distributed by them, thereby placing in his executors a *personal trust and confidence*, inconsistent with the extent of the devise, if it was not meant to take place in the compass of a life in being.

I trust I shall not be considered by the reader, from the circumstance of having presumed to labour in note (a) page 197. to support the legal construction of language, contrary to the sentiments thrown out by Lord *Kenyon* in the case of *Porter and Bradley*, and having ventured in the present note, to submit some observations, in favour of a liberal construction in support of the intent against the opinion thrown out by Lord *Thurlow*, in favour of the legal construction and import of words in the case of *Bigge and Bensley*, as inclined to cavil at the decisions of courts. No man entertains a stronger prejudice in favour of forensic decisions, or a higher veneration for the dignified and justly eminent characters, who presided on these occasions than I do; but respect for particular persons ought not to cheque that freedom of inquiry, which in science will alone conduct us to truth. There seems to me a material difference between breaking in upon *the construction of specific words, which have gained a fixed legal import*, so as to enable lawyers to decide immediately how far property may or may not be dealt with; which we cannot reject, without violating first and generally admitted principles; and pushing criticisms to the utmost extent upon such words, where the liberality of modern times, has struggled to get rid

I therefore apprehend, the judgment in the case of *Keily and Fowler*, does not at all

of technical conclusions, which stand in the way of giving effect to the intention, by admitting minute distinctions, deduced from additional language, or accompanying circumstances. If we now decide that the words "leaving no issue" as applied to real property, are not to be received in a different sense from those words, as applied to personal property, namely as implying a general failure of issue, we shake every title in which that circumstance has occurred from the period at which the case of *Forth and Chapman* was determined, down to that at which the case of *Porter and Bradley* occurred; but by favouring the criticisms either upon those words as applied to real property, or of the more general words "in default of issue," or the like, as applied to real and personal property, through the medium of additional words, or concomitant circumstances, we only escape from the trammels of technical reasoning, by the force of fair argument, founded upon specific and obvious differences, in favour of evident intention; or to speak in the spirit of the observation, in *Counder and Clarke*, *Hob. Rep.* 29. the legal construction, it strikes one, should never be over-ruled, unless the intent of the testator, or author of the language, appears by declaration plain; that is, not saying it in so many words, but plain expression, or necessary implication of his intent, which is the same thing, from words or circumstances which vary the case.

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clash with the decision of Lord *Hardwicke* in the case of *Beauclerk v. Dormer*. But that both those cases concurred, in confirming the very same distinction in regard to the effect or validity of an executory limitation of a personal estate after *a dying without issue*, under different circumstances of latitude or restriction, as the whole series of preceding cases seems to have furnished us with, if we class and estimate the resolutions in these cases according to the several grounds on which they appear to have been founded; and that the distinction thus to be collected, from a general comparative view of all the cases upon this point, appears to be no more nor less than this, *viz.*

That although in the limitation of a personal estate, after a dying *without issue*, those words shall not *ex vi termini*, and *without* the concurrence of any other circumstance of intention, signify a dying without issue *then living*, even though the limitation is in the nature of an estate-tail by *implication* only; yet on the other hand they shall not *ex vi termini*, when there *is* any other circumstance of intention, import an *indefinite* failure of issue, even though the limitation is in the nature of an *express* estate-tail; but that in either case,

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if the limitation rests solely upon the usual extent and import of those words, the limitation over is too remote, and therefore void; and the whole vests in the first devisee or legatee; but that in either case, the signification of these words may be confined to a dying without issue *then living*, by any clause or circumstance in the will, which can indicate or imply such intention.

1 Eq. Abr.
362. pl. 12.

But however, it has been said, that where a personal estate was limited to one *for life expressly*, and if he die *without issue*, remainder over, such remainder over was good; because the express estate for life should not be enlarged by mere words of implication. The place cited for this point in 1 Eq. Abr. is 1 Chan. Rep. 411. which must be an error in the print, for there is no such page or case in the book; in 2 Chan. Rep. 410. indeed, there is the case of *Smith v. Clever*, which is also reported in 2 Vern. 38. in which case it was held, where *interest* of money was bequeathed to one *for life*, and if she should die *without issue*, the *principal* to remain over, that the limitation over was good. But that decision turned upon a different principle; for that case was determined upon a distinction taken, between a bequest of the *interest* of money to one

Vide supra,
p. 360.

(373)

one for life, and a bequest of the money itself. A distinction which appears to have been since exploded in the cases of *Butterfield v. Butterfield* and of *Daw v. Pitt* before cited. And indeed from the general tenor of the cases cited in the preceding pages, it may be collected, that, with respect to the validity of the limitation over, it is the same thing, whether the devise of a personal estate be to one *for life* expressly, and if he die *without issue*, remainder over (a); or to one (indefinitely)

Vide *supra*,
p. 347. 360.

(a) It seems to be settled, as Mr. *Fearne* has observed since the case of *Love and Wyndham*, best reported 1 *Mod. Rep.* 50. that the words "if he should die without issue" after a limitation to one for life standing alone, unqualified and unexplained by any other words or circumstances, involve too remote a contingency to admit the limitation of a subsequent remainder of personal property; for accepting them in their natural sense, a remainder limited "on failure of issue," cannot take effect so long as there is issue in being of the tenant for life, and therefore must wait a general failure of issue; or if taken in their technical sense, as they are understood as applied to land, a devise of land to *A.* for life, and if he dies without issue of his body, then to *B.* gives *A.* an estate tail. These words therefore, taken either way, denote the testator's intent that

the remainder shall not take effect as long as there are any issue in being of the tenant for life.

Thus where one directed her house and all her effects to be sold, and laid out in the funds, for *B.* (after all her legacies were paid) during his life, and if he had no heirs, to go to his sister *W.* The question was, whether the devise over to *W.* was too remote, being after a dying without heirs general? The *Master of the Rolls* held the devise over to be good. But Lord *Hardwicke*, Ch. upon appeal, reversed the decree. His Lordship said, I have laid it down as a principle, that in questions of this sort, *the whole will must be taken together*, and from thence a judgment formed of the testator's intention. If I was to determine the limitation over to be good, I should destroy the principal intention of the testatrix, which was that *B.* and his issue should take before *W.* I cannot imply a gift to the issue as purchasers, which is not the case here. The word "heirs" must mean heirs of the body, and the testatrix certainly intended not only that *B.* but also his issue should take preferable to *W.* and that can only be by transmissibility; for they cannot take as purchasers. It is the same as if given to *B.* for life, and to the heirs of his body, and if no such heirs then over, the failure of heirs is not confined to a particular time, but is general. *Boden vers. Watson, Amb. Rep. 398. 478.*

However it seems to me, that since executory dispositions of personal property have been better understood and received into favor, the whole will must
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in those cases, where the intail takes effect by implication, as Lord *Hardwicke* observes in the case last stated, be taken together, and that construction favored which will effectuate the *general intention*.

Thus in the case of *Smith* *vers.* *Clever*, referred to *supra* 360. 362. 372. where *A.* after giving several legacies devised "that the rest and residue of her estate unbequeathed, should be put forth to *interest* by her executors, and that one half of the *interest* should be paid to the testator's sister *B.* during her life, and the other half of the *interest* unto her daughter *C.* and she to have one half of the testator's household goods, and after her mother's decease to have all the *interest* during her life; and the testator's will was, that if the said *B.* died without issue of her body, the *principal* of the residue should be divided equally between *D.* and *E.* and such children as were, or should be born of their bodies then living" The question was, as to the validity of the bequest to *D.* and *E.* And the Master of the Rolls, it is true, as mentioned in the context, took the distinction between a devise of the money itself, and of the interest of it. And as to the objection that had been made, that the *interest* having been given to *A.* for life, and if she died without issue, then the remainder over, &c. implied an estate tail both in *principal* and *interest*, he said an implication could not be against the plain intent of the party expressed in his will. And in this case the testatrix had carefully distinguished between *principal* and *interest*. And he

mentioned the rule taken in *Matthew Manning's* case, that the intention of the testator in his will ought to be observed, as far as might consist with the rules of law.

So that in the case last stated, the Master of the Rolls considered the circumstance of the interest alone being devised for life, and the subsequent bequest being of the *money itself* as distinguished from the *interest* of the money, material *only* as furnishing evidence of the testator's intention.

And in the case of *Stratton and Paine*, 8 *Vin. Abr.* 455. *pl.* 6. also cited *Fitzgibbon's Rep.* 321. where *A.* seised of a real estate and possessed of a considerable personal estate, gave to his sister *A.* 20*l.* a year to be paid her during her life, out of the revenues of his estate. And as concerning all the rest of his estate, both real and personal, he gave one moiety thereof to his sister *B.* for her life, and, after her decease to the heirs of her body lawfully begotten *equally among them all sons and daughters alike.* And the other moiety or equal half of his estate, real and personal, he gave and bequeathed the same to his sister *C.* and to the heirs of her body lawfully begotten or to be begotten, and for want of such issue, or heirs of her body, as aforesaid, he gave and bequeathed the same to the children of his sister *B.* equally among them, and to their heirs and assigns for ever, immediately after the decease of his said sister *B.* and not before. The limitation over of *C.*'s moiety to the children of *B.* was held void, but the

the limitation of *B.*'s moiety was held good; though it was said, there was no other difference than that in the latter, the devise was to the sister expressly for life.

This case is reported 3 *Bro. Ca. in Parl.* 257. and the only question seems to have been as to *C.*'s moiety, which she claimed absolutely, and was decreed to her. But there appears a material circumstance besides that of *B.*'s moiety being limited to her for life only, to distinguish the cases of the two sisters, namely, the limitation to the heirs of the body of *B.* being "*equally among them all, sons and daughters alike*" and which circumstance is omitted in the statement of this case in *Fitzgib.* and in *Viner's Abr.* and which was irreconcilable with an intent that *B.* should take an estate tail.

And the case of *Knight vers. Ellis*, stated *supra* 174. note (a). seems to favor the principle, that wherever the question arises in a case, where an estate is to be enlarged, or not, by words of implication, the intention is to be respected.

And *Ashhurst*, Just. 1 *Durnf. & East's Rep.* 596. delivered his opinion in favor of this principle, for he says "where there is *no express legal limitation*," the Court will consider the intention of the testator.

And where one gave to his dear wife all his personal estate, with this condition, to give to his
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three sisters, five pounds yearly, for their lives, or the life of the longer liver of them; presently after her decease the same he gave to his daughter *Mary*, with the same obligations to his sisters; and *then*, after his daughter's decease, to the fruit of her body, but for want of such issue or fruit, to his brothers or sisters *then living*, and after them, to their children, and the children of his brother; the question was, whether the subsequent limitations, after want of issue of the said daughter's body, or any, and which of them (the wife and daughter being dead without issue) were good. And on a case before the Chancellor, Lord *Raymond*, Ch. J. *Page*, *Reynolds* and *Probyn*, Justices, were of opinion, that the wife being dead and the daughter being dead, without issue living at her death, the subsequent limitations were good. And the Lord Chancellor decreed accordingly. *Brooks* vers. *Taylor*, *Moseley's Rep.* 188. 2 *Eq. Ca. Abr.* 367. pl. 12. 8 *Vin. Abr.* 313. pl. 33. *Andrew's Rep.* 12. Here it is observable that the devise over was to the brother or sister *then living*, and consequently an indefinite failure of issue of the daughter could not be meant.

The case of *Sheppard* and *Lessingham*, *Amb. Rep.* 122. is also a strong case to shew, that the construction ought to be made to answer the intention, wherever the intention does not aim at restraining the alienation of property, longer than is admissible by law in the ordinary course of enjoyment of it.

There one having two children, *A.* by her first husband, and *B.* by her second husband, devised
1500*l.*

1500 l. Bank stock, in trust, as to one moiety thereof to the use of *A.* for life, remainder to such child or children of *A.* as should be living at his death, and if he should not leave any child, or in case such children should die without issue, remainder to *B.* for life, remainder to such child or children of *B.* as she should have at the time of her death; and in case the said *B.* should leave no issue of her body living at the time of her death, or if such child or children as she the said *B.* should leave at the time of her death, should die without leaving any issue of his, her or their bodies, then to *P.* As to the other moiety, she appointed the interest to be paid to her daughter *B.* for life, remainder to such child or children as she her said daughter should leave at her decease, equally share and share alike; and in case her said daughter should leave no such child or children, or all such child or children as she should leave should die without issue, then to *A.* for life, remainder to such child or children of *A.* as should be living at his death, equally; and in case *A.* should leave no child or children, or if all the children of *A.* should die without issue, then to *P.*

B. had a son born at the time of making the will. *A.* died and then *B.* died. And *B.*'s son claimed the stock as representative of *B.*

And the question was as to the validity of the last limitation. And Lord *Hardwicke* in delivering the opinion of the court (which I shall state at large, for the sake of the principles laid down by him,) considered, first the intention of the testatrix, Secondly

condly the words of the will. 1st. The testatrix had two children *A.* and *B.* and a nephew *P.* It was plain her *general intention* was to provide, as far as she could, for her own issue; and in failure of them, then the stock was to go to *P.* By possibility her intention might go further than certain events, yet *ut res magis valeat quam pereat*, the court would take hold of *circumstances* to support the intention. There was no difference in the penning the disposition of the several moieties, except that in the one it was, if all such children should die *without leaving issue*, and in the other it was, if all such children should die *without issue*.

The first question was, whether the (last) limitation to *P.* was too remote, being after the death of a person not *in esse*? Secondly, Whether it was not too remote, as being after a dying without issue generally. He was of opinion with the limitation, on both the questions. As to the first question, construction of words was properly restrained to *prevent perpetuities*; by the first determinations personal estates could not be limited beyond a life or lives in being: afterwards they were extended one year farther: then to a child not *in esse*, and twenty-one years after; because *the alienation of property was not thereby restrained longer than by law it would otherwise be*: And all this was upon the ground of making the construction answer the intention. But the court never went so far as to say, that a limitation after the death of a person not in being without issue generally, was good. He considered it on the intention, 1st. If *A.* left no issue of her body at the time of her death,

death, she gave it to *P.* and in that event the limitation would have been good. 2dly, Or if such child or children should die without leaving issue, then over. *A.* had a son born, at the time of the will, and he could by the rules of law consider the testatrix having that child in view, and the will as if she had said "I give to such child or children of *A.* already born, and hereafter to be born, and living at the time of her death." On the first contingency the limitation over would be good, on the other bad. The second question was, If such child or children should die without leaving issue: a dying without issue generally was too remote, as in *Beauclerk v. Dormer*; but the "leaving issue" must mean so at the death of the person, and his Lordship alluded to the different construction of these words when applied to real and personal estates. He was of opinion that the limitation over, in the first limitation, was not too remote. There was a different penning in the limitation of the last moiety, it was after a dying without issue generally; but he was of opinion that the same construction was to be put upon those words as on the words "without leaving issue" in the other moiety. He considered in general that a limitation of a personalty after a "dying without issue," was void, but the court would put a construction on those words, and support the limitation over if possible. The only difference intended between the disposition of the two moieties was to prefer *A.* as to the one moiety and *B.* as to the other.

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It seems to me that on the last case the maxim *noscitur a sociis* applied and took the latter limitation out of the rule.

The case of *Butterfield and Butterfield*, *supra* 347. is clearly distinguishable from cases, where the interest of a personal fund is *first* given for life, and afterwards the principal is given over, for in this case the limitation is intire, viz. 100l. to be put out on security for the testator's son, *that he may have the interest of it for his life, and for the lawful heirs of his body*, which is a gift of the interest to the son and the lawful heirs of his body, and amounts to an express intail.

And in the case of *Clare* *vers.* *Clare*, stated page 373, the testator expressly alludes to an indefinite failure of issue, the limitation over being to take place when the issue male of his son shall happen to be extinct.

And the case of *Daw* *vers.* *Pitt*, and *Western* *supra* 347. seems to me to be clearly distinguishable from cases where the bequest is confined to personal estate only; for in the case of *Daw* and *Pitt*, the testator clearly intended that his real and personal estates should go together; *et vide Richards v. Lady Bergavenny*, *supra* 362, note (a). And if it stood upon the ground that there was no distinction between a limitation of the interest for life and the principal absolutely, and a limitation of the principal for life remainder over as in that case, it is over-ruled by the case of *Knight v. Ellis*, stated *supra* 176. note (a).

And

And if we reflect that in cases like *Daw vers. Pitt*, where a particular estate is first given, and a subsequent remainder to the heirs of the body of tenant for life, the union of the particular estate for life with the remainder, and consequent enlargement of the former estate, in the disposition of freehold estates, is not a construction founded upon any implication, that the testator intended such union, but the effect of a general rule of law, established on feudal principles, which are properly applicable to real estates only, and even in respect of such estates subject to criticisms and qualifications where its application is called for in devises, there seems to be no reason for adhering very strictly to the same rule, in the construction of limitations of personal estates, unless in cases where from the uniform current of precedents, courts are bound up, under the consideration, that, deviating from what has been the course for a long series of time and ages, though not perhaps originally founded on truth, may be productive of greater injury to society, from the uncertainty it introduces, than pursuing the ancient course, though originally begun on fallacious grounds. But if the precedents be not the same cases with that in question, and the principles upon which they were determined, are not fully applicable, courts may take a greater liberty and latitude, and through the aid of criticisms and minute distinctions, disengage themselves from the trammels imposed by such determinations. And if we observe the temper of courts of law, and equity at the present day, when the most operative words, are transposed, inserted and rejected to give effect

Of Executory Estates

effect to the general intention of a testator, there is great reason to think, that in cases of the nature of that now under discussion, the same liberality will induce them to pay great attention to any circumstance which may furnish a ground for distinguishing cases of this nature, in which we may take it almost as an universal proposition, that the testator, means to give the first taker an interest for life only.

The case of *Exel* vers. *Wallace*, 2 *Verz.* 118. appears to me a strong case in support of the principle, that courts will always incline to favor such a construction, as will support the limitation over, if it can be done, and will lay hold of any opportunity of referring such words to a want of issue at the time of the death, even in the case of a deed.

In that case a leasehold estate was settled in trust, to permit the husband to receive the rents and profits for life, afterwards to permit the wife to enjoy it during her life, after the decease of the survivor of them, then that the trustees, &c. should assign the said estate to the eldest son of the tenant for life, as should be by him begotten on the body of his then wife, *and for want of such issue, of such son*, in trust to assign the same to and among all and every the daughter and daughters, equally share and share alike: if there should happen to be no issue-male or female of their two bodies, then to the use of B. his heirs, executors and administrators. The inheritance of a small copyhold estate, was also comprised herein, and the son dying under twenty-one and without

without issue; the question was whether the remainder over to the daughters was valid? It was contended that if it had been a real estate, the son would have taken an estate-tail, and that, a limitation, which in real estates would carry an estate-tail, would in a term for years carry the whole term, and that therefore, the limitation over to the daughters, was void, in law, as tending to a perpetuity. *Sed per curiam*, It was not to be disputed, that a remainder over, on a general dying without issue, was too remote, and could not be supported; but if it could be considered as a dying without issue living at the son's death, the remainder to the daughters would be good. Some word must have been omitted in the engrossment, as would appear from the reading the clause. The first words "*such issue*" if they had stood alone might naturally have referred to the eldest son, but the subsequent words shewed that was impossible. The omission was unfortunately in the material part of the deed: but whatever conjecture might be made how this happened, and however by the insertion of some words it might be made consistent, the court could not go out of the deed itself, but must take it as it now appeared, and put the best legal construction it could upon it, and if it was capable of such a construction as would answer the end, *and not run into the danger of a perpetuity*, (which the law endeavoured to avoid) that surely was the construction the court ought to follow. The court was of opinion that might be done in the present case. If in every event the trust of the term expired within lives in being, it came within

the compass allowed by law for its suspension, and the point of time was the death of the survivor of the father and mother, who were first provided for; on whose decease the trustees were to assign to the eldest son, if then such in being, and to assign the whole term to him, not for life only, which might be liable to objection. Then the words "for want of such issue of such son" would prevent its going over to such daughters on there having been a son, who died before leaving issue. If there was no son and no issue, the trustees were then only to assign to the daughters, unfettered and as an absolute interest. The words related to the same time throughout, the death of the survivor of the father and mother. In the present case, from the omission, the words "such issue of such son" had no antecedent, to which they could be referred: then why should the court construe that limitation over to depend on a general dying without issue at any time, when the deed did not say so, and this in order to defeat the issue of the marriage, intended to be provided for? indeed where the words were in general dying without issue, in conformity with the legal interpretation, a dying without issue of the first tenant in tail, must be understood, and no intent of the party could be regarded, which was not consistent with the rules of law. If therefore the words had been plain, as in *Miss Dormer's* case, the court could not depart from them, but as they were not plain, and to construe it, that if at the death of the father and mother there was no son, was more natural than to construe it a failure of issue one hundred years after, that ought to prevail.
finitely)

finitely) and if he die *without issue*, remainder over. Thus in the case of *Love v. Windham*, *Supra*, p. 342. the devise was to one for life *expressly*, and if he die without issue, remainder over; and yet the remainder was held void.

So in a case where a testator devised a term to trustees in trusts for his son *T.* for so many years of the term *as he should live*, and after his decease, in trust for the issue-male of *T.* lawfully begotten, for so many years of the unexpired term as such issue male should live, and when the issue-male of his said son should happen to be extinct, then in trust for his second son *W.* for life, remainder over, &c. and made *T.* sole executor and residuary legatee; *T.* died without issue-male; though Lord *Talbot* held in this case that the subsequent limitation to the issue did not enlarge the *express* estate for life given to the first devisee; yet he also held that the remainder over upon the extinction of issue-male, (which is equivalent to a *dying without issue*, when taken as an *indefinite* failure of issue) was void; and that *T.* became intitled to it by the residuary bequest to him (*a*).

Clare v.
Clare.
Caf. Temp.
Talb. 21.

(374)

If

(*a*) So where *B.* being possessed of a term for one thousand years, in consideration of a marriage to be

If there is any difference between a limitation of a term, &c. to one *for life* expressly, and if he die without issue, remainder over; and a limitation to one *indefinitely*, and if he

had between *H. B.* his son, and *C.* granted the same to trustees in trust, that *B.* should receive the profits till the marriage, and after the marriage to permit *H. B.* the son and his assigns to hold the premises, and receive the profits for so long of the said term as he should live and no longer; and after his decease should permit the said *C.* and her assigns to hold and enjoy the premises, and receive the profits for so long of the term as she should live, and no longer; and after the decease of the survivor of *H.* and *C.* should permit the premises to be enjoyed by the issues of the bodies of the said *H.* and *C.* between them to be begotten, for and during so long of the said term as such issue should have a being and continue *in rerum natura*, to take and enjoy in like manner as heirs in special tail *by course of descent*, do hold and enjoy, and for default of such issue then over. The Lord Chancellor, after great deliberation was of opinion that the limitation to the issue in this case vested the estate in *H.* and *B.* and not in the issue. *Bullock v. Knight*, 1 *Chan. Ca.* 265. 2 *Chan. Ca.* 114. And in the former book the Lord Keeper decides this case upon the principle, that an use to the husband and wife, and after to their issue, they then having none, is all one as if limited to them and the heirs of their bodies; and the issue take nothing as purchasers.

die

die without issue, remainder over, it might be this; that although in the latter case, (where there are no restrictive circumstances to confine it to a dying without issue *then living*) the whole vests in the first devisee; yet in the former it might perhaps in some instances at least, be considered as returning to the executors or personal representatives of the testator, after the death of tenant for life.

That in the latter case (where there is no such restriction as above mentioned) the whole vests in the first devisee or legatee, appears from the above cited case of *Burford v. Lee* and the other case cited from *Freeman*; as well as from other cases which might be cited: and possibly the above cited case of *Clare v. Clare*; where Lord *Talbot* held, that the limitation to the issue did not enlarge the express estate for life; and consequently that *T.* did not take the whole term by virtue of the limitation, but that the residue of the term, after his life-interest, vested in him as residuary legatee of his father, might be resorted to as affording an instance of the residue intirely resulting to the executor in the former case. *

Supra, p. 236.
and vide 2
Siderf. 151.
and *Saltern v.*
Saltern supra,
p. 368.

(375)

Supra, p. 373.

Sed. vid.
Boden v.
Watson,
Amb. 398.
478. et su-
pra.

* This passage is so altered by Mr. *Fearne* in his copy.

Vide 1 P. W.
666.

1 Salk. 231.
Eyres v.
Faulkland
and vide
Pollex. 32.

(376)

For though it seems, that wherever a term is devised to one for a day, or an hour, it is held to be a devise of the whole term, if the devise over be void, and it appear to be the intention of the testator to dispose of the whole from his executors. Yet, if such intention does not appear, then it has been held, that a limitation of a term to one for life, does not vest the whole so absolutely in him as to be at his disposal, but leaves a possibility, (*viz.* upon the death of the devisee within the term) of reverter in the executors of the testator. Thus where *A.* possessed of a term for 99 years, devised it to *B.* for life, and then to *C.* for life, and so on to five others successively for life; after the death of all seven, upon the question who should have the residue of the term, it was adjudged to revert to the executors of the testator (*a*).

(*a*) So in the case of *Kimpland* vers. *Courtney*, 1 *Freem.* 250. *A.* possessed of lands for a term of one thousand years, devised the said lands to *B.* for fifty years, if she should so long live, and after the decease of *B.* devised the same to *C.* It was held that *B.* took no estate for life by implication, but in case he had over-lived the 50 years, then the executor of the deviser should have held it during the life of *B.*

Upon

Upon the distinction between a dying without issue generally, and a failure of issue confined to the period of a life in being; it seems to follow, that though an executory devise *in tail* or *in fee* to one *in esse* after a dying *without issue*, is void; yet an executory devise *for life* to one *in esse*, to take place after a dying *without issue*, may be good; because in the latter case, the future limitation being only for *life* of one *in esse*, it must necessarily take place during that life, or not at all; and therefore the failure of issue, in that case, is confined to the compass of a life in being.

Vide Lyde v. Lyde,
1 Durnf. & East Rep.
598.

Upon this principle it appears that the resolution in the case of *Oakes v. Chalfont*, may be accounted for and maintained; where a term was limited in trust for one for life, then for his wife for life, then for *B.* for life, then for his children for their lives, and *for want of such issue*, to *J.* for life, then to his children for their lives, and for want of such issue, then to *S. C.* for life, with other limitations over. The first devisee and his wife died, and *B.* and *J.* died without issue; and upon the question, Whether the limitation to *S. C.* was good? It was adjudged that it was good. Here we observe, the limitation to *S. C.* was only for life, so that if all the preceding trusts

Oakes v. Chalfont,
Pollexf. 38.

(377)

did not fail or expire in the life-time of *S. C.*, that limitation could not take effect; and consequently it was confined to the period of a life in being, *viz.* the life of *S. C.*, and therefore did not create a perpetuity.

2 P. W. 608.
in case of
King v. Cot-
ton.

So in another case, where *A.* tenant *for life*, demised to trustees for 99 years, *if she should so long live*, in trust for herself during her widowhood, and after her marriage, then in trust for *C.* her second son and the heirs of his body, and if he died *without issue*, then in trust for *D.* her next son. Upon the question, whether the limitation over to *D.* was good? It was said, that the only objection to limiting a term to one and the heirs of his body, and then over in default of issue, was, because it would make a perpetuity; but here the whole term being to determine on *A.*'s death, there could be no perpetuity; nor, indeed, could there, for the subsequent limitation could not possibly take effect, unless it was in the life-time of *A.* The court, it appears, gave no opinion on this point; but the reporter (with good reason, as it seems) adds "*ideo quære*, though it seems rather to be a "good limitation of the trust, and within the "reason of the Duke of *Norfolk's* case and "the

"the several other subsequent resolutions (378)
"grounded thereupon." (a)

And upon the same principle Lord *Hardwicke* observed, that if a man limits a sum of money, on failure of issue of the bodies of husband and wife, to any other person *in tail*, it would be void as an executory devise; being too remote as depending upon a dying without issue *generally*; but where the limitation over is *for life*, there it is a reasonable construction to confine it to a failure of issue during a life in being; which had been held in the cases of executory devises to be good, if

Vide 3 Atk.
449.

(a) One devised 8000*l.* to trustees, upon trust that they should dispose thereof in the purchase of lands of inheritance in fee simple to be settled to the use of her grandson *M* and the heirs of his body, and for default of such issue directed the trustees to convey the same to the Drapers' Company, upon trust, that they should within three months after the estate should be conveyed to them, by mortgage or sale of some part thereof, raise and pay to *L.* the testator's nephew 3000*l.* which she bequeathed to him *on the death of her grandson without issue*. It was held that the devise to *L.* was not upon too remote a contingency. *Attorney General* vers. *Milner*, 3 Atk. Rep. 112.

The

if it falls within the compass of ever so many lives in being at the same time (a).

The above bequest seems to me to have been capable of being supported upon two grounds; first that the devise to *L.* depended upon an estate-tail which might have been barred, together with the remainder over on which the legacy was charged; secondly on the ground that *being to be paid out of a real estate*, it would sink into the inheritance on the death of the legatee before it became payable in favour of the heir-at-law, and therefore must take effect within a life in being, or not at all.

(a) There is another series of cases which falls properly under the present head of inquiry, *viz.* Devises of real estates after payment of debts.

There are several different ways of giving real estates, subject to debts, but they seem to me to be capable of being divided into two classes, namely those which may exhaust the inheritance, and those in which the provision for payment of debts, operates *merely* in the nature of a chattel interest, and in which the inheritance devolves on the heir or devisee subject to such chattel interest. The former class includes all those cases in which the first devise is to trustees and their heirs, in trust to sell, or to trustees expressly in trust to sell; the latter class comprehends cases where lands are devised to persons for payment of debts, and no words of limitation are annexed to the devise, nor any express trust to sell which

which in effect is equal to the annexation of words of limitation to the devise, as a trust to sell necessarily imports that a fee simple is intended to be given, and accordingly carries that estate.

The case of *Robinson and Comyns, Ca. Temp. Talbot* 164. in which the testator devised all his lands to C. and his heirs, to the use of him and his heirs, in trust for payment of his debts, and afterwards in trust for his granddaughter M. and the heirs of her body, remainder over, is an instance of the first sort.

The case of *Bagshaw and Spencer*, stated by Mr. *Fearne*, vol. 1. 82, 84. furnishes also another instance of this sort.

The case of *Popham and Bampffield*, as stated, 1 *Vern.* 79. falls under the latter class of cases to which we have above alluded. In that case R. devised lands to B. and others, for the payment of his debts and after his debts paid then in trust for the use and benefit of P. and his heirs male.

There seems to be a material difference in the operation of these modes of providing for payment of debts as to their operation on the estates limited to take effect, after the debts discharged; for in cases where the disposition is to trustees and their heirs, or where there is an express trust to sell, the charge *primâ facie* absorbing the whole fee, the limitation over, after payment of debts cannot take effect by way of remainder,

remainder, but must operate, either as an executory devise, or as a trust in equity. But in cases where there are no words of limitation annexed to the estate of the trustees, or express trust to sell, then the estate of the trustees involves only a chattel interest, and the subsequent limitations take effect as remainders limited thereupon.

Thus in the before mentioned case of *Popham and Bampfild*, which arose on a bill exhibited in equity by *B.* for carrying into effect the purposes of the will, it was objected that the plaintiff *B.* had no title to sue in equity, for that there was no trust; but if he was to take any thing by the will, the estate was executed to him at law already by *the statute of uses*, the words being, *in trust for the use and benefit of B.* and therefore he might seek his remedy at law; and this was admitted by the court, though the suit was retained on the ground that *B.* was intitled to have an account of the estate and a discovery what debts were paid, in order to be let into the estate. But for the reason before mentioned the legal estate could not have been executed in *B.* if the provision for payment of debts had involved any larger interest than a chattel.

And in *Cordal's case*, *Cro. Eliz.* 315. one point resolved was, that where a devise was to two persons, of lands, to hold for payment of the legacies in a will, and the debts of the testator, and afterwards to *E. D.* his brother for life, remainder to his first son in tail, and so to the second, the remainder to the heirs of the body of *E. D.* that this was no freehold

freehold in the two persons, but only a term for years, although it could not be said for any certain number of years, for the profits were not certain, nor the debts; yet it was a chattel and *quasi* a term, as a devise during the minority of J. S. or land extended for debts, and this was in favor of wills, but otherwise it was of such a limitation in a deed, for there it was a *freehold conditional*. *Vid.* 8 Co. 96. *Manning's case*.

Again in the case of *Carter and Barnardiston* *, 2 Bro. Parl. Ca. 1. anno 1717. stated *supra* vol. 1. 278. 281. the testator devised that in case his personal estate and his estate in C. and B. (which were devised to his executors to be by them sold, and the monies arising from such sale, disposed of in the payment of his debts and legacies) should not be sufficient to pay his debts and legacies (as in fact they were not) then he gave his executors full power to receive the mesne profits of his whole estate lying in P. and W. or elsewhere in *England*, that the rents or profits to arise thereby should be employed in discharging the remainder of his debts, and devised his manor of P. and W. to his uncle E. A. for life, and in case his uncle should leave issue male then to such issue male and his heirs for ever, and after the death of his uncle E. A. in case he should leave no issue male, and after debts and legacies paid, he devised one estate to his nephew

* (N. B. Same case by the name of *Lodington and Kime*, 3 Lew. 431. *Trinity 5 W. & M.* 1694. in *Common Pleas*.)

T. S. in fee, and the other to his nephew *B.* in fee, and he declared that his debts were among those which were mentioned in the schedule to his will annexed and no more. After the will, the testator paid all his scheduled debt, and then mortgaged his estate at *P.* for 4000*l.* by a term of one thousand years, and in the mortgage deed he covenanted for the payment of the money. Then he made a codicil, whereby he disposed of after-mentioned lands.

And the judges were directed by the House of Lords to give their opinion on several questions, among which were the following.

First, Whether the will of Sir *M. A.* did extend to include all the debts of the said Sir *M. A.* ?

To which their opinions were delivered, that it did extend to include all his debts.

Secondly, Whether the estate for life was vested in *E. A.* before all debts were paid ?

And the Judges were unanimously of opinion, that the estate for life was vested in *E. A.* before the debts paid.

But as we have before observed, where the provision for payment of debts is made by way of trust of the inheritance expressly to be sold, or where the devise to the trustees is followed by words of limitation to their heirs, and subsequent limitations are added after the payment of debts, the limitation

tion over cannot take effect by way of remainder upon a chattel interest, but must operate either as an executory devise, or as a trust in equity.

Accordingly, in the before-mentioned case of *Bagshaw and Spencer*, it was contended on one side, that if *T.* could not take by way of remainder, because the limitation to the trustees was in fee, he might by way of executory devise, for though a fee could not be mounted upon an absolute fee-simple, it might upon a determinable one. But Lord *Hardwicke* inclined to the opinion, that *T.* could not take the legal estate by way of executory devise, for that it seemed to be too remote, being after all the testator's debts should be paid, which might in point of time exceed the compass of a life or lives in being.

But although such subsequent limitations cannot take effect as executory devises, or future estates, giving no interest at all to the objects before the debts are actually paid, they are supported through the medium of equity, as vested equitable estates subject to the debts.

There are a variety of cases which furnish authorities for this proposition; but before I state them, I shall submit some observations upon the grounds on which they are to be supported.

The complete ownership of land, according to our law, involves *two things*. The estate of the
land

land and the right to take the profits. The former we call the *legal estate*, the latter the *use*.

The *use*, before the statute of uses, was a mere trust, cognizable only in equity. Since that statute *uses* have been distinguished into *two* kinds; *viz.* such as are *executed* by the statute, and such as are *executory*. The latter are precisely analogous to uses before the statute, and remain mere trusts cognizable only in equity.

When a legal estate of land is vested, and remains in one person and his heirs, and the right to take the profits or use is in another person and his heirs, they have *distinct* and *separate* estates; the one the *legal estate* in the land, the other an estate in land, *as a trust*, which is a use in consideration of law, and follows the person of *cestui que trust*, being the beneficial interest and profit. Both estates are *concurrent* and *vest* at the same moment.

But where a legal estate is vested in trust, it is a *principle in equity*, that so much of the trust as is not disposed of in the conveyance, *remains* in the alienor as his ancient trust. This is called a *resulting trust*. And if the disposition be by will, such resulting trust in the devisor will, on his death, devolve on his heirs. Thus a conveyance or devise to trustees and their heirs to pay debts, or to them to sell and pay debts, passes the whole estate in law to the trustee, and *part only* of the trust, that is, the trust to the extent of the particular purpose; and the residue of the trust will go in the same manner as the purchase

purchase money ; which is the trust of a real estate ; according to which all persons may come into the court and pray a conveyance of the estate, which cannot be opposed, and these were the grounds of the determination in the case of *Roper* *vers.* *Radcliffe*, 9 *Mod.* 167, 181. 10 *Mod.* 23. *viz.* that the surplus of the estate sold, being real, whoever had a right to the trust might have brought a bill claiming it as real estate. The surplus was held there to be real, as part of the ancient trust, on this principle, that the owners might have come into the court, and taken upon themselves the payment of the debts, and desired the surplus of the estate to be conveyed to them.

So in the case of *Barker* *vers.* *Giles and Smith*, *Sel. Ca. Chan.* 17. where a man devised his estate to trustees to be sold for payment of debts and legacies, and the residue in trust to the use of *A.* and *B.* and the survivor of them, his heirs and assigns, &c. Lord *King* Ch. said, in this court this is to be considered as a real estate ; and his Lordship construed the limitations on which the case arose accordingly.

And the same principle applies in the cases of terms created by the owner of the inheritance in trust for particular purposes ; so much of the trust as is undisposed of results to the owner of the inheritance, and constitutes a part of that inheritance.

Thus if a man seised of lands in fee of an estate of inheritance, devises the lands for a term of years for the payment of debts; the profits of the land beyond the debts, and the term itself, after the debts paid, will belong to the heir, and the term will be from thenceforth, without any declaration to that effect, attendant upon the inheritance. The ground of which is, that although all the legal estate in the term is parted with, yet only part of the trust is disposed of; and that not only the inheritance, but *likewise all the trust undisposed of* (that is) the whole trust of the inheritance and the residue of the trust of the term descends to, and is part of, the old use or trust in the heir.

And if a person claims such equitable trust or estate, (subject to a legal devise of the fee to trustees for payment of debts) under a limitation to himself and the heirs of his body, or to himself for life, and to his first son, and the heirs of his body, he can in the former case, by himself, by a fine, and in the latter by joining with the son in a recovery, acquire the equitable fee, subject to the primary trusts of the legal fee.

The case of *Basket v. Peirce*, 1 Vern. 256. is an instance of the first kind. There one by his will devises his lands to trustees for ninety-nine years, for the payment of his debts and legacies, and afterwards in case they should not act, and take upon them the trust within six months after his death, he devised the said lands to *another and his heirs*, in
trust

trust to pay his debts and legacies, and *afterwards* to *A.* in tail, remainder in tail to *B.* *A.* levied a fine and died without issue. Five years passed and non-claim. The question was, whether this fine by *cestui que trust* in tail and non-claim, should bar the remainder-man in tail? And it was held that it should. And though it was insisted that the remainder-man was not barred by non-claim, for that all the debts and legacies were not paid, and so his title was not commenced. Yet the *Lord Keeper* was of opinion the remainder-man was barred.

The case of *Robinson and Comyns* mentioned before in this note is an instance of the latter kind, in which it was held that the testator's granddaughter with her husband was capable of suffering a recovery.

And the case of *Bagshaw and Spencer* stated *supra* 84. is also an authority of the latter kind; for in that case the testator's debts were not paid at the time of suffering the recovery, and it was allowed that there was a legal estate in the trustees in fee till the debts paid, and that *B.* therefore could make no good legal tenant to the *præcipe*. But *Lord Hardwicke*, it appears did not consider this circumstance as influencing the question, but decided against the recovery on the ground of the limitation being a mere executory trust, as distinguished from a trust executed, and the parties *therefore* not competent to suffer a recovery; to which ground his Lordship need not have resorted, had the recovery been invalid as suffered before the debts were paid.

It is necessary in these cases of equitable recoveries that the remainders to be barred by them should be of the same nature as the estate of the tenant to the *præcipe*, namely equitable; for a recovery suffered on an estate derived under an equitable freehold will not bar a legal remainder.

Thus in the case of *Shapland and Freeman*, 1 Bro. Chan. Rep. 75. where S. devised his estates to B. C. and D. upon trust that they and their heirs and assigns should yearly by and out of the rents and profits thereof, after deducting rates, taxes, repairs and expences, pay such clear sum as should then remain to the testator's brother C. S. and his assigns, during his natural life, and from and after his decease to the use and behoof of the heirs male of his (the testator's) brother lawfully begotten, and in default of such issue remainder over: it was held that a recovery suffered against a tenant to the *præcipe* made by C. S. was void as against the remainder-man, because C. S. had but an equitable estate for life, and the subsequent remainders were legal, and an equitable estate for life and legal remainders would not unite, and therefore of course there could be no good tenant to the *præcipe*.

And in the case of *Salvin and Thornton*, stated in a note Bro. Chan. Rep. page 73. in the second edition, and in the addenda to vol. 1. in vol. 2. of the first edition page 2, 3. where T. seised of land for life, with remainder to his first son T. in tail male, remainder to his second son J. in tail male, remainder to himself

self in fee, forfeited in the rebellion in 1745. The estate for life being put up for sale by the commissioners, was bought by *M.* in trust for *T.* the tenant in tail. *T.* thus seised of the *equitable* estate for the life of his father, (the legal estate being in the trustees) and the *legal* estate-tail, suffered a recovery and soon after died leaving issue a daughter, wife to plaintiff, *J.* The second son took possession, suffered a recovery (after the death of his father and the trustee, in whom his estate vested) and died leaving two daughters, the defendants, who were in possession; and on a bill filed by the husband of the daughter of *T.* for an account of the profits, and to have the estate delivered up, the great question in the cause was, whether the recovery suffered by *T.* who had an equitable estate for life, and a legal estate tail, was capable of barring the legal remainder? And upon very full argument the following points were laid down by his Honor the Master of the Rolls, and seemed to be assented to by the whole bar, 1st. That a recovery may be suffered of an equitable estate. 2dly. That such a recovery can only affect equitable remainders. 3dly. That a recovery of an equitable estate must in all respects imitate a legal recovery, and therefore that the person suffering an equitable recovery, must have such an equitable estate, as had it been a legal estate, would have enabled him to suffer a legal recovery. 4thly. That an equitable estate cannot, in suffering a recovery, be blended with a legal estate. 5thly. That as recoveries suffered of those different estates are perfectly distinct from each other, a recovery of either

estate will not affect the other, the recoveror of the legal estate being always the trustee of the possessor of the equitable estate, and the recoveror of the equitable estate becoming always the *cestui que trust* of him who has the legal estate. And it was the opinion of the Court, that T. not having such an estate as would enable him to suffer a perfect legal, nor a perfect equitable recovery, the recovery was totally invalid.

The case of *Robinson and Comyns*, before in part stated in this note, gave rise to a very curious question on this subject: for in that case the limitation over, after the trust for the testator's granddaughter in tail, was to C. and his right heirs, upon condition that he should marry the testator's granddaughter, so that C. was seised of the legal estate in fee-simple in trust for payment of debts, and of the equitable remainder in fee-simple, subject to the payment of debts, expectant on the determination of the equitable estate-tail limited to the testator's daughter, in trust for himself, and his heirs on performance of the condition imposed. The granddaughter, tenant in tail, rejected C. and married with another person, and she and her husband suffered a common recovery and died leaving issue; and one question as to the validity of this recovery, turned upon the nature of the estate, under the said will, in remainder to C. Whether it was a trust or a legal estate. And the Lord Chancellor, as this case is reported, said, it was observable, that the *whole* estate was given to C. and his heirs, to the use of him and his heirs, which was a complete

plete disposition of the whole legal estate; and being in case of a will would have been so of an equitable interest likewise, unless the testator's intent appeared to the contrary, as in this case it manifestly did; for it was given on trust for payment of his debts, &c. and so far was a limitation of an equitable estate, the remainder of which (had it gone no further) would, after the purposes served, have returned to the heir at law. But then there came a remainder to C. and his right heirs, &c. It was true that the word *remainder* (properly speaking) signified only a continuance of the same kind of estate as was before limited, which here was only a trust estate, for when the *whole* legal estate was disposed of, and part of the equitable interest likewise, there the remainder must be an equitable remainder. The testator therefore had considered this as an equitable interest. And yet it was likewise true that this equitable interest, when vested in the same person with the legal one, must, as to some purposes, be considered as a legal interest.

A question had been made whether the interest of the granddaughter was barrable by a recovery? It had been said that a legal and an equitable interest could not be incorporated together; but that objection could not affect this case: for though the legal and equitable estates could not be incorporated, yet the testator had not limited an equitable estate, and then the legal estate; but had at first given the whole fee. It happened indeed that the last part of the equitable interest might be considered as merged

as coming to the same person, who had the whole legal estate in him, but it would be hard, that by coming to the defendant C. although not absolutely, it would be hard, his Lordship said, that this should prevent their incorporation. He therefore thought it an equitable estate in C. as well as in the granddaughter, and consequently that she and her husband could bar it.

We have seen that Lord *Hardwicke* in the case of *Bagshawe* and *Spencer*, entertained some doubt whether the limitation, after payment of debts generally, if considered as carrying a legal estate was not too remote. Certainly, if it be considered as creating a contingency, by which the period at which the subsequent fee is to take effect in defeazance of the fee vested in the trustees is to be ascertained, it would be liable to the objection of being too remote, because the period or time of payment being indefinite, and consequently the commencement of the future interest being so, it is uncertain in point of time, whether it may not exceed a life or lives in being or any other period allowed by law, for executory estates; and that objection would equally hold if the quantum of debts were ascertained; "for it is not the *unascertained* quantum of the charge, that renders the limitation, after payment of debts too remote, as an executory or future interest, but the indefiniteness of the period or time of payment (that is of the *commencement of the future interest*) that prevents its validity. The specification of the debts to be paid advances not a step towards *limiting the period* of

of their being raised and paid ; that remains equally unlimited and *indefinite* whether the debts be ascertained or not, and may *equally* in *point of time*, exceed a life or lives in being, or any other period allowed by law for executory estates; and consequently is equally liable to the objection of remoteness.

But the case of *Strong* vers. *Teatt*, 2 *Burr.* 912. which arose on a writ of error, brought upon a judgment given by the Court of King's Bench in *Ireland*, deserves our attention here, as although no precise opinion is given on the point by the Court of King's Bench here, yet sufficient is said by Lord *Mansfield* to shew that the Court would be strongly inclined to support such limitations on any admissible ground.

In this case the testator, after providing for payment of his debts out of his personal estate as far as it would go, proceeds. " And to the intent that all my debts may be honestly and truly paid and discharged, I do hereby give and devise unto my wife *O.* and *her heirs* all that and those the towns &c. whereof I am seised in fee-simple, &c. to the use intent and purpose that my wife shall take and receive out of the said lands, as an addition to her jointure one annuity of 100 *l.* during her natural life, and to this further use intent and purpose that my said *wife* may by sale of such of the *lands* hereby to her devised raise so much money as may be sufficient to pay off and discharge such of the said debts

as

as shall not be paid off and discharged out of my personal estate; and as to so much, part of the said lands and tenements as shall remain unfold, to the use following (subject to the annuity to the wife) to the uses of my son *A. M.* for and during his natural life with remainder to his sons in strict settlement, with remainders over. The Court of King's Bench in *Ireland* held that the reversion in fee of certain lands settled passed by that will, and that the *uses* were *legal estates executed*, subject to a charge for payment of the testator's debts (if any there were) and to a power in *O.* to sell for that purpose; and were *good at law*, though devised after an indefinite payment of such of the testator's debts as should not be discharged by his personal estate.

The point as to the validity or invalidity of the limitation of the devise over after payment of debts *generally* concluded to a non-suit at law only; the *final merits* and question of *right* depended upon the *construction* of the will. On that the court of King's Bench in *England*, were of opinion that the judgment was wrong. But such reversal did not meddle with or affect the opinion of the *Irish* court, in respect to the operation of the limitations after payment of debts.

Lord *Mansfield* upon the argument in the King's Bench suggested, that it might be worth considering "whether this was not a double contingency" *viz.* *if there should be debts*, then his wife to have the estate for payment of them: *if no debts*, then, those in remainder to take" however it did not appear that

that there were any debts; which shewed the inclination of the Court to support those limitations on any admissible ground, if the decision had turned upon that point.

And it may further be observed that in cases of *this nature*, there is nothing more to confine the effect of the words *from and after*, or *when*, &c. in construction to the *time* or *actual* commencement of the interest introduced by them, than there is in the common limitation of an estate to a man for life, and *from and after his decease* then to another, &c. They only denote the order or course of the several interests connected by them, expressing the priority or preference of the antecedent, and the posteriority or subjection of the subsequent, in point of *usufructuary* prevalence or effect, without preventing the latter from a concurrent operation in attaching immediately as vested and transferable interests in a present subsisting fund.

And it seems that where the trust for payment of debts is determinable upon an estate for life, no objection can be taken to a limitation over, after payment of debts generally. Accordingly Lord *Hardwicke* distinguished the case of *Lady Jones v. Lord Soy and Seal*, stated *supra* vol. 1. 35. from that of *Bagshaw and Spencer* on the ground that the devise there to the trustees amounted only to a devise to the trustees and their heirs, during the life of *C. F.* And then his Lordship said it was only an estate *pur auter vie*, on which a legal remainder might properly be limited, and so it was held. *Vid.* the case of *Bagshaw and Spencer*, as reported in the *Collectanea Juridica*, vol. 1. 383.

Of other Matters relating to executory Devises.

WE have seen, in the preceding part of this treatise, that in respect to limitations of real estates, where an estate for life is given to the ancestor, followed by a limitation to his heirs general or special, the subsequent limitation vests in the ancestor, and the heir takes not by *purchase*. But in the limitation of personal estates, a similar rule does not always hold. If a term be devised to one *for life*, and afterwards to the *heirs of his body*, these words are generally words of *limitation*, and the whole vests in the first taker: as is evident from several of the cases before cited.

Dod v. Dickinson, Vin.
vol 8 p. 451.
pl. 25.
Supra p. 346.
2 Atk. 376.
3 Atk. 398.
And vide
Daw v. Pitt
supra p. 347.

Theobridge
v. Kilburn,
2 Vez. 233.
Vide infra,
p. 283.

So where a term was limited in trust for S. during her life, and *immediately* from and after her decease, to the heirs of the body of S. lawfully to be begotten, if the term should so long endure, and in default of such issue, then to B. Lord *Hardwicke* expressed himself of opinion, that the whole term vested in S.

Garth v.
Baldwin,
2 Vez. 646.

And again, where real and personal estate was devised to trustees in trust to pay the profits to G. during his life, and afterwards to pay

pay the same to the heirs of his body. Lord *Hardwicke* held that the personal estate vested absolutely in G. by this limitation.

However, if there appears any other circumstance or clause in the will, to shew the intention that these words should be words of purchase, and not of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase.—I shall first instance this in two cases of limitations of the trusts of a term in marriage-settlements. But I have before observed, that executory devises and the limitations of the trusts of a term, are governed by the same rules. (380)

Supra p.354.

Thus where a term for 900 years was assigned in trust, to permit the husband and wife, and the survivor of them, to receive the profits for so many years as they, or the survivor of them, should happen to live, and after their deaths, to the use of *the heirs of the body* of the wife by the husband to be begotten; Lord Chancellor *Jefferies* decreed that the whole vested in the wife; but afterwards the Lords Commissioners decreed that the heir of the body took by purchase, and that it did not vest absolutely in the mother who survived, so as to go to her administrator. * This last decree was afterwards affirmed in the House

Peacock v. Spooner,
2 Vern. 43.
195.
2 Freem. 114.

2 Vern. 362.
2 Freem. 231.
Dafforne v.
Goodman.

(381)

House of Lords, though the Judges were six to two against it. The same point was afterwards decreed in a similar case of *Dafforne v. Goodman*; where a term was assigned in trust to permit *Y.* to receive the profits for so many years of the term as he should live, and after his death to permit *A.* his intended wife to receive the profits for so many years of the term as she should live, and after both their deaths, to permit the heirs of the body of *A.* to be begotten by the said *Y.* to enjoy the lands for the residue of the term. This latter decree was grounded on the authority of the preceding.

It is true no particular expression in either of these cases, determined the intent to be, that the heir of the body should take as a purchaser; but these being cases of marriage-settlements, it was reasonably enough inferred, that the issue of the marriage were intended objects of the settlement, and the term not designed to vest wholly in the mother. But afterwards, in a subsequent case of a marriage-settlement, a decree at the Rolls, grounded upon the case of *Peacock v. Spooner*, was reversed, and the limitation to the heir-male decreed to be void.

The

The cause was this : On the marriage of *A.* his grandfather assigned a term for 100 years in *trust* for *A.* for *life*, then to *A.*'s wife for *life*, and after their deaths for *the heirs of the bodies* of *A.* and his said wife: the wife died leaving issue, *A.* survived; it was determined that the whole term vested in *A.*—This last case appears to have been the ruling authority ever since in cases of the like nature; and that of *Peacock v. Spooner*, it seems is only attended to in cases exactly the same in *specie* with itself, as was that of *Dafforne v. Goodman*, as reported by *Freeman*.

1 P. W. 132.
Web v. Web.

And vide
1 P. W. 360.
Hayter v.
Rod, supra
P. 343.
(382)

Vide 2 Vez.
660.

But there have been other cases which have proceeded entirely upon circumstances of evidence of the intention. As where a term was settled in *trust* for one if she should so long live, and after her decease, in trust for her husband if he should so long live, and after his decease, in trust for the heirs of the body of the wife, begotten by the husband, and *their executors, administrators and assigns*; Lord *Hardwicke* decreed, that the limitation to *the heirs of the body*, &c. were words of purchase, as he held the addition of the words *executors, administrators and assigns*, strong evidence of the intent to give only an usufructuary

2 Atk. 89.
Hodgson v.
Bulley.

Vide Barnardist. Rep. in
Chan. 199.
2 Vezey 660.

fructuary interest for life, and to vest the property in the heirs of the body (a).

The

(a) So where *A.* possessed for 2000 years of a tenement, in consideration of a marriage to be and after had, and of 350 *l.* portion, and for provision and stay of living of the husband and wife and their children, demised to trustees for 1700 years, if he and his wife, or any of their issue live so long, *in trust for, &c. for 99 years* * remainder to the heirs of the body of *A.* on that wife. They had issue three daughters, two of whom got an assignment of the whole term, and had administration to the father. And the question was, whether the third daughter was intitled to a third with her sisters; for though it was insisted for the administratrix, that the trust of the whole term vested in the father, and was executed in him; and that the daughters, though the heirs of his body, could not take by purchase in this case, yet the Master of the Rolls conceived that inasmuch as there was a particular term of ninety-nine years taken out of the 1700, and that the father had a particular estate limited unto him during 99 years, that the trust of the whole term during the 1700 years was not executed to the father. And his Honor said that *construction of trusts must be governed by intention*, and this being the case of a marriage settlement, and the intention plain, it ought to be supported, and his Honor did con-

* These words seem to have been omitted in stating the case in *Vernon*.

The like point was decreed in the case of *Read v. Snell*, before cited; in which case the decision was grounded on the words *leaving no heirs of her body*, which were considered as relative to the time of her death, and therefore restrained the general import of the preceding limitation to the life only of the first taker.

Read v. Snell,
2 Atk. 642.
Supra, p. 359.

(383)

And in this case of *Read v. Snell*, Lord *Hardwicke* cited the case of *Paine v. Stratton*; where *P.* bequeathed personal estate to *S.* for life, and after her decease to the heirs of her body lawfully begotten or to be begotten, and for want of such issue or heirs of her body as aforesaid, he gave the same to the children of *M. immediately after the decease of S.* These words,

Paine v.
Stratton,
2 Atk. 647.
cited.
Reported
3 Bro. Ca.
Parl. 157.

ceive in this case, that though the word *heirs* was not properly a word of purchase, yet there being a particular estate for life, during a particular term, limited to the father, that the limitation to the heirs of his body, afterwards on that marriage, would carry it to all the daughters equally: and he was the more of that opinion, because it was declared in the deed, that after the death of the father the trustees should execute estates, to the person and persons respectively, that should be interested according to their respective shares therein, which shewed that the children should all take their several shares. *Vide Ward v. Bradley*, 2 Vern. 23.

words, *after the decease of S.* it seems had been interlined, and afterwards erased; and Lord *Macclesfield*, and afterwards the Lords Commissioners, though they held the limitation over void, because these words were not admitted to be part of the will, yet seemed to think it would have been otherwise, if these words had not been erased.

Supra, p. 379.

And so indeed in the above cited case of *Theebridge v. Kilburne*, though Lord *Hardwicke* was

So in *Sands and Dixwell*, cited 2 *Vez.* 652, 661. Where freehold and leasehold were devised in trust to convey to the separate use of his daughter for life, without the intermeddling of her husband; and after her decease to the heirs of her body, the question was whether the daughter took an estate-tail, or *heirs of the body* were words of purchase: and Lord *Hardwicke* held they were words of purchase; and the governing reason with his Lordship was, that it was impossible to make such a conveyance, as the testator had directed, that is, to be settled so as to be to the separate use of the daughter for life, without the intermeddling of her husband, unless such a construction was made; for if tenant in tail, the husband must have been tenant by the curtesy.

Again in *Price v. Price*, 2d May 1727, cited 2 *Vez.* 234. Where one on his marriage settled a leasehold

was rather of opinion, that the whole term vested in S. and that there was no ground for any other construction unless from the word *immediately*, which he thought was too precarious; yet he seemed not to be very confident that the limitation to the heirs of the body might not, even in that case, operate as words of purchase: and held that the limitation then would have vested in the son of S. who died an infant in her life-time, though he did not live to answer the description of heir; for that it would then amount to the same thing as if it had been to the *issue* of her body; and that where the words heirs of the body, when taken to be words of purchase in such a limitation, have been construed in the sense of issue, it was never held necessary that the issue should survive the first taker, so as in strictness to be heir; for that it was not like a limitation to

Vid. 2 Vez.
236.

(384)

hold estate to trustees to the sole and separate use of his intended wife for life, for her jointure, and from and after her decease to the use of the heirs of the body of the wife, by the husband to be begotten, and for want of such issue, to the use of the husband and his heirs for ever: she died leaving only a son, and the husband took out administration to her, insisting the whole interest vested in her. But Sir Joseph Jekyll held that on the wife's death, the leasehold vested in the heirs of her body as purchasers.

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the

the *heir* of the body in the *singular number*, which would be such a description as to shew, that such person as was strictly heir should take.

V. 3 Atk. 398.
in case of
Lampley v.
Blower,
supra, p. 360.

And again, a limitation of a term to *A.* and to *her issue*, it seems, vests the whole in *A.* if the devise rests there, though the addition of the subsequent words, and if *A.* die *and leave* no issue, Lord *Hardwicke* said, related to any child living at *A.*'s death, and therefore shewed, that such issue was to take after *A.*'s death, and consequently the word *issue* there was to be considered as a word of purchase.

Warman v.
Seaman,
Fin. Chan.
Rep. 279.
2 Chan. Ca.
208.
And vide
Clare v.
Clare,
supra, p. 373.

But a devise of a term to *A. for life*, and afterwards to his issue, it seems, does not enlarge the estate to *A.*, but after his death the whole vests in the issue (*a*).

It

(*a*) It is said in the case of *Davis v. Gibbs*, 3 P. Will. 26. that if a term were limited to *A.* and after his death to his heirs, or to *A.* and after the death of *A.* to the heirs of *A.* the whole would vest in *A.* and go to his executors; for such would be the construction if one devised a term to *A.* for life, remainder to his heirs, the whole would vest in *A.* in like manner as if an estate of inheritance were

It seems formerly to have been held in some cases, that an executory devise of a term to a person not *in esse* was void; but that point is long since settled to the contrary, and it is certain, that any executory devise, whether to a person *in esse* or not, is good, if confined to take effect within the limits before expressed.

1 Mod. 34.
Pollex. 32.

(385)

Vid. Stephens
v. Stephens,
&c. *infra*.

I shall next proceed to some observations in respect to certain limitations of subsisting leases for lives, which neither have the effect of regular limitations of estates of inheritance, nor yet operate as executory devises. Thus it is if a person seised of an estate *pur autre vie*, devises it to one (*indefinitely* or for life) and to the *heirs of his body*, or to one *and his heirs*

were limited to *A.* remainder to his heirs, and the same construction would be made on a limitation of such estate to *A.* and after his death to his heirs, or to *A.* and after the death of *A.* to the heirs of *A.* And several reasons seem to favor this construction, for what heirs are in respect of estates of inheritance, executors are in respect of chattels, and by law where a term of years is given to any one, it shall, after the death of the grantee go to his executors and not to his heirs. And whatever a man takes as executor, he takes in right of his testator.

X 3

and

and if he dies *without heirs of his body*, or, in general to one in such manner as would give him an *estate-tail* in lands of inheritance, remainder over, the limitation, in these instances, makes no estate-tail properly so called; for all estates-tail must be of inheritance; nor are these limitations executory devises; but it appears, that the limitation to the heirs of the body may carry the estate to them, and a remainder over may take effect, if the person intitled by virtue of the limitation in tail makes no disposition of the estate. But the person intitled under the limitation in tail, it seems, may if he thinks fit dispose of the whole, and bar as well the remainder over, as his own issue.

(386)

Low v.
Burton,
3 P. W. 262.

That a remainder over is not void, and that the issue may be barred, appears in a case, where J. C. seised of an estate for three lives, devised the lands to his daughter M. for life, remainder to her issue male, and for want of such issue remainder to L., afterwards M. in consideration of an intended marriage, conveyed the lands to the use of herself and her intended husband, and the heirs of their bodies, remainder to the heirs of her intended husband. M. died without issue, and upon a claim under the remainder man L. the question was, whether

whether the remainder of an estate *pur autre vie* to *B.* after a devise thereof to *A.* in tail was good; and if so, whether it might be barred by *lease and release*.

The court agreed, that the limitation of an estate *pur autre vie* to one and the heirs of his body, makes no estate tail; for all estates tail are estates of inheritance, to which dower is incident, and must be within the statute *de donis*; but in the limitation of an estate *pur autre vie*, there was no inheritance nor dower, nor was it within the statute, but was only a descendible freehold. And Lord Chancellor held it was a good remainder to *B.* on the decease of *A.* without issue, it being no more than a description who should take as special occupant during the life of *cestui que vie*. And his Lordship said, that though by *lease and release* *A.* might bar the heirs of his body as in some measure claiming under him, yet he inclined to think that *A.* could not bar the remainder over to *B.* especially by the conveyance by lease and release; nay indeed it seemed to him as if no act of *A.* could bar the limitation to *B.*

(387)

But however, that the remainder over, as well as the issue, may be barred in such cases,

X 4

appears

Duke of
Grafton v.
Hanmer,
3 P. W. 266.
in the note.

(388)

appears by another decision; where *D.* a feme covert being tenant for life, remainder to her first and other sons by a former husband in *tail male*, under a devise of lands held by lease for three lives, *S.* the son of *D.* by her former husband, brought his bill to have the lease renewed and settled on *D.* for life, remainder to *himself and his heirs*; the court conceived it could not be done, till a fine *sur concesserunt* was levied by *S.* and *D.* and her husband, (for *D.* we find was under coverture) but that being done, and an assignment of the lease (by lease and release) to new trustees being made, the court ordered, that the new lease should be to the new trustees upon the trusts so desired. The reporter adds, that it seems reasonable, that the first tenant in tail (improperly so called) should be allowed to bar the limitations over; for though the original lease be only for three lives, yet it being the interest of both landlord and tenant that the leases should be renewed, and it being the doctrine of the court of Chancery, that all such new leases are subject to the old trusts, the estate might by this means continue for ever, without any possibility of being barred.

Baker v.
Bayley,
2 Vern. 225.

And indeed in a former case, where *A.* having settled an estate, which he held for three lives,

lives, to the use of himself in tail, remainder to *D.*, surrendered the old lease, and took a new one to himself; *D.* brought a bill to have the benefit of the remainder preserved to him; the court held the remainder void, and dismissed the bill, saying, that if it were good, it might be barred by *deed* or *surrender*, or *other conveyance*, without a common recovery.

And so where *N.* holding lands to him and his heirs for three lives; upon his second marriage, settled the same to the use of himself for life, remainder as to part to the use of his first and every other son in tail-male, remainder to his own right heirs; and as to other part to the use of such child or children of the marriage, and for such estates as he should by deed or will appoint, and for want of such appointment to the first and every other son in tail-male, remainder to his own right heirs. There were several children of the marriage; and afterwards, upon the marriage of *R.* the eldest son, *N.* by deed, which was also executed by *R.* settles the lands in trust for himself for life, remainder to *R.* for life, and if he should die without issue male of his body, remainder over.

Norton v.
Frecker,
1 Atk. 524.

(389)

Upon

Wasteneys v.
Chapple,
1 Bro. Parl.
Ca. 457.

Supra p. 387.

Upon a claim after the decease of *R.* without issue, by a son of a younger son of *N.*'s second marriage, Lord *Harawicke* was of opinion, that by virtue of the remainder limited to the first and other sons in the first settlement, the plaintiff would be intitled, if nothing had been done subsequent to bar his right. He said that in the case of *Wasteneys* and *Chapple* in the House of Lords in 1712, it was determined, that in respect to estates thus granted in fee determinable on lives, a person may take by way of remainder as a special occupant; but that as such an estate tail is not within the statute *de donis*, nor barable properly by a recovery as an estate tail, *any limitations depending thereon are intirely in the power of the first taker in tail*, and may be destroyed by any conveyance or even articles in equity, and that it was so determined in the case of the Duke of *Grafton* v. Lord *Euston*, in 1722, in which his Lordship was counsel himself.—That the latter settlement in the principal case, amounted to a good disposition by *R.* of all the interest claimable by him, or any other in remainder after him; clearly so with regard to the first part of the lands, tenant for life and remainder-man in tail of an interest vested having joined in the conveyance, and limited the estate to other uses; and

as to the other part of the lands, though no remainder was *vested* in R. yet the father and son both joining amounted to a good disposition of it. (a)

(390)

So

(a) And in the case of *Forster v. Forster*, 2 Atk. 259. C. F. the father of J. F. and F. F. upon the marriage of his eldest son J. F. settled a freehold church lease held for three lives, in trust to permit J. F. to enjoy it for his life, and then his wife to enjoy it for her life, and subject to a charge for younger children's portions, in trust for the heirs male of the body of J. F. and in default of such issue, in trust for the heirs males of the body of the said C. F. the father, and in default of such issue to the right heirs of C. F. And the wife of J. F. and the only son of J. F. by his wife being dead, and there being daughters of the marriage, J. F. made a settlement of the church lease and levied a fine *sur concessit* and died without issue male. Upon the death of J. F. without issue-male, F. F. claimed title to the leasehold premises, insisting that by this settlement, his eldest brother was only tenant for life, and that the limitations to the heirs males of his body were words of purchase, and created a Contingent Remainder to his heirs males, and that the limitation to the heirs males of the body of his father C. F. was a Contingent Remainder to take effect in the person who should be the heir male of the body of the father at the time of the death of J. F. and that J. F. could not be the heir male of the body of his deceased father, within the meaning and operation

2 Atk. 376.
in Saltern v.
Saltern.

So in another case, Lord *Hardwicke* said, that in the case of a devise of a lease for lives to

ration of the deed, because a life estate was expressly limited to him; and in the case of a descendible freehold it vests in the heir, not as heir, but as special occupant; and that *J. F.* could never take as occupant under the description of heir male, because the occupancy could not arise till after his own death; and therefore, that the heir male, who was to take the Contingent Remainder must be *F. F. viz.* the heir male of *C. F.* at the death of *J. F.* the tenant for life, and that if *J. F.* was but tenant for life, his settlement and *fine sur concessit*, could not bar the Contingent Remainder which ought to take place in *F. F.*

But on the other side it was insisted that the limitation to the heirs of the body of the father, was not a Contingent Remainder, but operated as words of limitation, and must mean the heirs male at the death of *C. F.*, that *J. F.* was the heir male, and that his wife and son being dead, his life estate, and the limitation to him as heir male, were united, and in the case of an inheritance he would be tenant in tail in possession, and in case of a descendible freehold, he had the whole interest in him, and might dispose of it as he pleased.

And Lord *Hardwicke* was of this opinion, and said that as tenant for life, and the person in remainder in nature of a tenant in-tail, of a freehold lease,

to a man, and if he dies without issue, remainder over, the first taker has a power over it during his own life; but if he makes no use of that power, upon his death it vests in the remainder-man, who takes as special occupant.

So that now it appears to be settled beyond dispute, that where leases *pur autre vie* are limited to one in tail, he may, by *lease and release* or any other conveyance proper for passing estates of freehold, bar his own issue and all re-

lease, could certainly join and bar the settlement; so the same person who had both these interests in himself might also bar the intail of the freehold lease. And though it seemed absurd that the person who had the express estate for life, should also be the occupant; which occupancy in strictness, did not arise till the death of the tenant for life, yet in reality the limitation, which in the case of an estate of inheritance, would create an estate-tail, did, in the case of a freehold, give the party the whole interest, so as to empower him to dispose of it; and his Lordship put the case, suppose a second son tenant for life of such a freehold lease, remainder to the heirs of the body of the father, the tenant for life, and the eldest brother, the heir of the father, might certainly bar the intail; and therefore where the same right is in one and the same person, he may certainly do it.

mainders

mainders over, and make a complete disposition of the whole estate. (a)

But

(a) And in *Blake v. Blake*, before the Court of Exchequer in 1786, it was held that the mere renewal of the lease by the first taker in tail, of the trust estate, *even without the concurrence of the trustees* barred the limitations over and enabled him to dispose of the estate by his will. *Vid. 3 Cox's P. Will. fol. 10. n. 1.*

So in the case of *Grey v. Manock*, stated 6 Durnf. and East's Term Rep. 292. Lord Northington considered that the person who would be tenant in tail of such an estate, if it were an inheritance, is intitled to the actual ownership.

In this case a bishop's lease for three lives was devised to trustees in trust for *B.* for life, remainder to *F.* his wife for life, remainder to their first and other sons in tail male, with limitations over. *B.* died, and Sir *F. M.* who was the first son, did, in the life-time of *F.* his mother, who was then in possession, by fine *sur concessit*, and deed of uses, limit the estate to himself and his heirs; after which, upon his mother's death, he entered, and afterwards surrendered the then subsisting lease, and took a new one for fresh lives. Subsequent to this he made his will, and devised this estate to his wife, who contracted for the sale of it: but the purchaser having some doubt whether the limitations over were well barred, a
bill

But an estate *pur autre vie* may be limited to one for life, so as to confine his interest and power

bill was brought, for performance of the contract, and the present Sir *F. M.* an infant, and the remainder-man, and other proper parties, were brought before the court. *Et per* Lord Northington Chancellor, This is a descendible freehold, not intailable within the statute *de donis*, and therefore no common recovery could be suffered of it, but the person who would have been tenant in tail, had it been an inheritance, is intitled to the absolute ownership, as at common law, the conditional fee became absolute by the parties having issue. He therefore decreed performance of the contract, and the widow who was the devisee of Sir *F. M.* to convey.

Lord *Kenyon*, by whom the above case was stated from a note, observed in reading it, that the fine *sur concessit* in this case had no other effect than any other act *inter vivos*, and that he supposed it had been levied in this case in conformity to what was done in the case of the Duke of Grafton *vers. Hammer*, stated in the context *supra* 387. though the same reason did not apply.

In that case the fine was necessary on account of the owner being a *feme covert*.

And Lord *Kenyon* further observed, that Lord Northington seemed to be of opinion Sir *F. M.* might have defeated the remainders by his will alone. To this latter part of the note his Lordship observed, he
(Lord

power of disposition to his own life-estate only; as where an estate *pur autre vie* is limited

(Lord *Kenyon*) had added a *quære* : but at that time he was young in the profession, and he had generally understood that the remainders in such an estate could only be defeated by some act *inter vivos*; but on further consideration, he was not sure that the first taker might not destroy them by his will. He desired however to have it understood that he was not deciding any thing on this point, by which he was bound in future, when it might become necessary to consider it; but at present he was rather inclined to think that the first taker might bar the remainders over by his will alone.

If the principle laid down by Lord *Northington* be true, *viz.* "that the person who would be tenant in tail of such estate, were it an inheritance, is intitled to the absolute ownership" it seems to follow as a necessary consequence, that it would pass by his will, discharged from any subsequent limitations; but none of the cases seem to warrant that conclusion, for they all turn upon the ground of some act done in the life of the testator, while he was in possession. And if this principle cannot be supported, then it seems to me questionable, whether the determination as to the effect of a will in severing a jointenancy, does not turn upon principles which by analogy bear upon this question, and furnish a strong argument against the conclusion, that a will will destroy the remainders in such case :

mitted to *A.* for life, remainder to *B.* for life,
there the first taker cannot bar the remainder.

This

case: for the reason given, *Littleton, Sec. 287.* why a devise by a jointenant is void, is thus expressed by him "and the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion which surviveth, by the survivor, the which he doth not claim, nor hath any thing in the land by the devisor, but in his own right, by the survivor according to the course of law." Now if the title of the survivor in such case is good against the devisee, because no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion, or as Lord *Coke* comments on this passage, *Co. Litt. 185. b.* "the reason of which priority is that the survivor claimeth by the first feoffor (*i. e.* the person creating the jointenancy) and therefore his title at law is paramount the title of the devisee." Either of those reasons seem to me as applicable to the case of persons claiming in remainder after an estate in nature of an estate-tail in land held *pur autre vie*, as to the case of a person claiming by survivorship; for it is not considered either by *Littleton*, or his commentator, as an abstract incident of this species of estate, but founded upon the effect and operation of the deed creating the jointenancy, and of the will as referable to the interest of the different claimants, at the instant of the death of the jointenant first dying.

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And

This was clearly held by the court in the above cited case of *Low v. Burron*, for such a li-

And in a *case* in my possession, in which the following circumstances occurred, *viz.* the first tenant in tail of such an estate which he took, subject to a mortgage, joined with the mortgagee afterwards in an assignment by lease and release to another person, who paid off the first mortgage, and the assignment was expressed to be made *subject to the old equity of redemption* then subsisting under the first mortgage, and a doubt arose whether this was such a disposition as would bar the intail. And Mr. *Fearn* admitted that a question might have been made, whether the tenant intail's concurrence in such an assignment barely to pay off the mortgage money, would have amounted to such a disposition as would bar the intail; but he was clearly of opinion, that if the consideration for securing of which the assignment was made did not consist wholly of principal money then due upon the old mortgage made by the testator, but included some arrears of *interest* due upon the principal money owing upon the *old* mortgage when the account was stated, that the turning of this interest into principal, and thereby increasing the sum charged upon the lands, by making such lands a security for a greater sum after the assignment, than they stood subject to before under the old mortgage, was in fact the creation of a new equity of redemption, and consequently amounted to a disposition

a limitation in remainder after a life-estate only, has no tendency to a perpetuity.

And in a case, where *A.* having a freehold lease for three lives to her, her executors administrators and assigns, assigned it and all her right title and interest in and to the same, to a trustee to the use of her son *S.* for and during the term of his natural life, and from and after his decease to the use of *his issue* lawfully begotten, and for *want of such issue* to the use of *A.* her executors and administrators during the residue of the term. Lord *Hardwicke* held, that *S.* took an interest for his life, and the whole residue of the lease vested absolutely in the issue, for he construed the words *for want of such issue male* to mean not *leaving issue*; and that the effect of the limitation was to the son for *life*, and if he had any children, that they should have it absolutely, and if he should have no child, then to *A.* her executors and administrators.

Williams v.
Jekyl,
2 Vez. 681.

(391)

And vide
Warman v.
Seaman,
supra, p. 384.
and Pollex.
122. and
Knight v. Ellis, supra 176.

position of, or act of absolute ownership, exercised over the whole estate, which was the subject of the devise, and therefore effected a bar. *Fearne's MSS Opin.* vol. E. 378.

Y 2

And

Vide 3 P. W.
265.

And it is the same thing if the first limitation be for 20 lives all spending at the same time, since it amounts to no more than the life of the survivor of them.

(392)

Here indeed it may not be improper to remark, once for all, that any limitation in future, or by way of remainder of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our courts considered as void in its creation; as in the case of a limitation of lands in succession, first to a person *in esse*, and after his decease to his unborn children, and afterwards the *children* of such *unborn children*, this last remainder is absolutely void; and there is no carrying the estate to them but by comprising them in the extent of the estate limited to their parents, *namely*, to the unborn children of the person *in esse*; that is, by giving such unborn children of the person *in esse*, an estate of inheritance, which is an estate tail.

And it is upon this principle, that the constant practice of limiting an estate-tail to the first and other sons in marriage-settlements is founded,

founded; for though a child unborn might take an estate for life (a) as well as an estate-tail,

(a) See *Lovelace's case*, *Saville's Rep.* 75. 2 *Leon.* 35. pl. 45. 8 *Vin. Abr.* 239. pl. 3. Which arose upon an action of waste against *T. L.* who held lands under a devise by *J. L.* to *H. L.* his son, to have and to hold to the said *H. L.* and to the eldest issue male of his body issuing, and for want of such heir male of his body, remainder to *T. L.* son of the said *J. L.* *et hæred' mascul' de corpore suo legit' exeunt'*. Then *J. L.* died *H. L.* then having no issue male, and after the death of *J. L.* the said *H. L.* entered and afterwards had issue *J. L.* the defendant, his eldest son, and then *H. L.* died, and *J. L.* entered by force of the will; and the question was, if *H. L.* alone took by the devise, or his eldest issue in remainder, and what estate. And it was agreed by all the justices that no estate tail was created by the words "eldest issue of his, *H. L.*'s body" nor any way implied from the limitation, in remainder over, for default of issue. And the plaintiff had judgment to recover, which judgment could only be given upon the ground that the eldest son took an estate for life; for if he had not taken such estate, the action of waste could not have been maintained against him, as he would then have had no interest in the land except by abatement.

The case of *Denn on dem. Briddon v. Page*, *Mich.* 24 G. 3. furnishes another instance of this sort. In

Y 3

that

tail, yet such estate would not extend to the issue of such child, and no estate limited to

that case (after a devise to *S. Nash* son of *T.* and *M. Nash* for life, remainder to trustees to preserve Contingent Remainders, remainder to the first and other sons of *S. Nash*, and the heirs male of his and their bodies respectively) the testator proceeded "and for default of such issue, to the use of all and every the daughter and daughters of the said *T. Nash*, on the body of the said *M.* his wife begotten, and to be begotten, and for default of such issue, to the use of the right heirs of the said *T. N.* for ever; and it was held that the daughters had an estate for life only. *Vid.* 3 *Durnf. and East Term Rep.* 87, note (a).

So in the case of *Hay* and the Earl of *Coventry*, 3 *Durnford and East Term Rep.* 83. Sir *R. W.* being seised in fee, of the premises in question, devised them to *J. W.* and *R. W.* and their heirs upon certain trusts therein mentioned, and subject thereto upon trust to stand seised thereof to the use of his grandson *R. Lord C.* for life, remainder to trustees to preserve Contingent Remainders, remainder to the first and other sons of the said *Lord C.* in tail male, remainder to *Lady F. C.* for life, remainder to trustees to preserve Contingent Remainders, remainder to the first and other sons of the said *Lady F. C.* in tail male, and in default of such issue "to the use of all and every the daughter and daughters
 " of

to such issue, as purchasers, would be good (a).

There-

“of the body of the said Lady F. C., lawfully issuing, as tenants in common and not as jointenants; “and in default of such issue, to the use and behoof of “his own right heirs for ever.” All the preceding limitations being expired and Lady F. C. having left only one daughter Lady C. H. who died without issue male, leaving an infant her only daughter and issue; the question was what estate Lady C. H. took in the estates in question. And it was held that Lady C. H. took an estate for life only in the estates in question.

(a) But although an estate limited to the issue of such unborn child, as purchasers, would be bad for reasons that will be herein after explained, any vested remainders after an estate for life limited to an unborn child would be good; Mr. Butler indeed in his notes upon *Coke on Littleton*, page 277. in speaking on the subject of powers, illustrates the doctrine he is there laying down, by a proposition which seems to contradict what is here asserted, for that Gentleman, to distinguish between a limitation, taking effect by the exercise of a power contained in a deed, and the same limitation inserted in the body of the deed itself creating the power, observes, as one known and peculiar circumstance attending powers of the nature of those of which he is there speaking, “that by the execution of such a

Y 4

“power

Humberston
v. Humber-
ston.

1 P. W. 332.
and vide 3
Burrow 1632.
et seq.

Therefore where a testator devised lands to
a corporation in trust to convey the said lands
to

“power viz. a power of appointment, a life estate
“may be limited to a person not *in esse*, at the time
“when the deed giving the power was executed,
“with remainders over. Now if we consider these
“limitations as inserted in the original deed, the
“remainders over would be void; for though a
“person may limit an estate for life, to a person not
“*in esse*, he cannot limit a remainder upon it. But
“these limitations under powers of appointment,
“are in every day’s practice; and estates for life
“with remainders over, are limited under them to
“persons not *in esse* at the time of the execution
“of the original deed, in the same manner, and to
“the same extent, as if instead of being devised out
“of the seisin of the feoffees of the original deed,
“and in that point of view as making a part of that
“deed, the uses and estate so limited were created
“by an original substantive, independant and integral
“conveyance.” This Gentleman in his additional
notes to *Co. Litt.* 271. b. has corrected the propo-
sition above stated, as to any distinction between the
exercise of the powers in a deed, and limitations in
the same deed, in respect of the persons capable of
taking by way of remainder, under the execution
of such powers, or under such limitations, but he has
left his proposition as to the capacity of limiting a
remainder by an original deed, to take effect after
an estate for life to a person not *in esse* unex-
plained,

to M. for life, and after his decease to M.'s first son for life, and so to the first son of that first

plained, and he seems now even to doubt whether such power enables the donee thereof, to appoint a life estate to a person not *in esse* (viz. an unborn child) for *he says*, speaking of a particular or unqualified power, "where the objects are qualified, as a power of appointing to the children of the party himself, though *perhaps* it may enable him to appoint life estates, to children unborn at the date of the deed creating the power, yet if it enables him to appoint life estates to those children, it *certainly* does not authorise him to extend the appointment to the children of these children so as to make them take by purchase, nor to appoint any other estate which might not have been created by the very deed, creating the power." This hypothetical mode of speaking, as to such power enabling the donee of it to appoint a life estate to a person not *in esse*, by a Gentleman of high professional reputation, and his leaving the other proposition, as to the incapacity of a person to limit a remainder, to take effect after an estate for life to a person not *in esse*, by the limitation of a use in the original deed, without the aid of a power therein, unexplained, leaves these as matters of doubtful construction, which seem to me clear beyond the possibility of dispute; for the only criterion by which the validity of limitations of this kind, whether effected by a direct limitation of an use, or through the medium of a power, are to be measured, in respect of their being, or not being too remote, seems to be

first son for life, &c. and if no issue-male of the first son, then to the second son of *M.* for life,

their tendency or non-tendency to a perpetuity; every limitation of property is admissible by the law of *England*, however capricious, if it be free from the imputation of tending to a perpetuity; a limitation to a person not *in esse* for life, with vested remainders over, is certainly free from this imputation, for the remainder-man may alien his interest immediately, and should a person come *in esse* answering the description prescribed by the power, that person, as soon as he attains the age of twenty-one, together with the remainder-man, may make an absolute disposition of the whole estate, consequently such limitation does not tie up any portion of the property subjected to it, for more than twenty-one years after a life in being, which is clearly within the bounds the law prescribes in such cases.

Thus in the case of *Rutledge and Dorrell, Vex. jun. Rep. vol. 2. 357.* which arose upon a settlement of stock and money upon *A.* for life, after his decease, for his wife *B.* for life, and after the decease of the survivor, if there should be any issue of the marriage, to pay divide and distribute, assign and transfer the trust premises, or the securities in which the same should be invested, unto and among all and every the children, and grandchildren or issue of the said intended marriage, if there should be more than one, in such shares and proportions, and under

life, and so to his first son, &c. with remainders over to about fifty others for their lives successively,

der such restrictions, limitations and conditions, and at such time and times, and in such manner and form as *A.* and his wife, by any deed or deeds, writing or writings, to be by them duly executed as the settlement expressed, should from time to time, or at any time or times during their joint lives, direct or appoint, and for want of such appointment unto and among all and every the children and grandchildren, or issue of the intended marriage, if more than one, in such shares and proportions, &c. as the survivor should from time to time, &c. by any deed or deeds, writing or writings executed as aforesaid, or by his or her last will and testament give, declare, direct or appoint, and for want of such appointment, &c. *A.* died and *B.* by her will, made in pursuance of the power, appointed that part of the trust premises should, upon her decease, be transferred to her executors upon trust for *E.* her daughter, for her separate use for life, and after her decease, then over. *Et per the Master of the Rolls,* A question might arise, how far an unborn child is to be made tenant for life; but it is established on good principles in precedent, certainly, that this may be. The doubt was, whether it was not tying up the estate beyond lives in being, and *twenty-one years* afterwards: but that is not so, where the absolute interest is disposed of, and vested, though part is given for life; for that person with the person

successively, and their respective sons when born, for their lives respectively, and so on without giving an estate-tail to any of them, or making any disposition of the fee. Lord C. *Cowper* held this to be a perpetuity; but that the conveyance should be as near the intent as the rules of law would admit, viz. by making all the persons in being but te-

son having the absolute interest may dispose of the estate. It is not unalienable *.

The above is a case in point, as to the capacity of the owner of an estate to limit a remainder after a life estate, to a person not *in esse*, through the medium of a power; and the cases stated *supra* 392 note (a) and the reasons and principles stated by his Honor in deciding upon the case of *Routledge and Dorrell*, so obviously apply, with equal force, to an express limitation, through the medium of a use, instead of through that of a power, that it seems to me unnecessary to occupy the time of the reader in suggesting any other reasons in support of so fully admitted a proposition as that no estate can be limited through the medium of a power, which would not have been valid or inserted in the original deed, which necessarily involves the converse proposition, that every estate which will be valid, if limited through the medium of a power, will be equally valid, if limited through the medium of a use in the deed creating the power.

* Et vide *Adams v. Adams*, *Cowper* 651.

nants for life, and limiting estates tail to the sons unborn (a).

With

(a) And this principle of *cy pres* was applied to a use executed in the case of *Nichol and Nichol*, 2 *Black. Rep.* 1152. which arose upon a case out of Chancery for the opinion of the Court of Common Pleas, where *A.* devised all his real estates to trustees to the use of the *second son* of *B.* begotten or to be begotten, during the life of such second son; and after the death of such second son, or in case he should inherit his paternal estate by the death of his elder brother, then to *his second son* lawfully to be begotten, and his heirs male; and for default of such issue, to the third, fourth, and other son and sons of the said *B.* severally and successively, according to the priority of birth, and the heirs male of the body of such third, fourth and other sons, respectively: and in default of such issue, to the same trustees and their heirs, to the use of the eldest son of *C.* during his life, and the heirs male of his body, remainder to the second son of *C.* and the heirs male of such second son lawfully issuing, remainder to the use of the third, fourth and other son and sons of the said *C.* severally and successively, &c. and to the heirs male of their respective bodies, and for default of such issue, he devised all his freehold estates before-mentioned to *D.* and his heirs for ever. He also gave and bequeathed all his customary land to the said *D.* and for default of such issue, to the heirs male of the said *D.* and for default of such issue to the customary heirs of the testator: the Court certified
unanimously

Vide Carth.
310. Reeve
and Long.

With regard to executory devises we are to remember, that wherever one limitation of a devise

unanimously that the estate vested in the second son of *B.* (when any such should be) by way of executory devise, and would in the mean time descend to the heir at law of the testator, and also that in order to effectuate the general intent of the devisor, such second son would take an estate *to him and the heirs male of his body*, determinable on the accession of the paternal estate

Lord *Kenyon* when Master of the Rolls, applied this principle of construction *cy pres*, adopted in the above cases, to an appointment under a power, in the case of *Pitt v. Jackson*, 2 *B. & C. Rep. Chan.* 51.

In that case, money was, previous to a marriage, covenanted to be laid out in the purchase of lands, to be settled to the use of *A.* for life, without impeachment of waste, remainder to *B.* for life, in bar of dower, remainder to the use of the children of the marriage, *subject to such powers, limitations and provisions*, as *A.* by deed or will should appoint, and for want of such appointment, then as *B.* should appoint, and in default of such appointment, to the use of their children, and in default of issue to *A.* in fee. *A.* had several children by *B.* but two daughters survived them. *A.* by his will, in execution of the power in the settlement, directed part
of

devise is taken to be executory, all subsequent limitations must likewise be so taken. This is

of a sum of money to be laid out in the purchase of estates, to be conveyed in trust for his daughter *M.* during her life, for her separate use, remainder to trustees to preserve contingent remainders, remainder to all and every the child and children of his daughter as tenants in common, with remainders over. And one question on this part of the case was, whether the gift to *M.* for life, with remainder to her children, was a good execution of the power. And it was acknowledged that it was not a good execution as to the children, but was so far void; and then the question was, whether if the appointment was bad on account of the excess, the whole should be considered as unappointed. *His Honor* stopped the argument of this point, by asking, whether it should not go by *cy pres*, and cited the case of *Chapman v. Brown*, stated *infra* in this note as an authority.

And a similar decision was made in the case of *Robinson and Hardcastle*, 2 Durnf. & East's Term Rep. 241. which was a case sent by the Lord Chancellor for the opinion of the court of King's Bench. The facts were as follow.

By settlement on the marriage of *A.* with *B.* *C.* the grandfather of *A.* and *A.* conveyed estates to trustees to hold, after the marriage, and after a limitation to
A. for

is laid down as a rule by Serjeant *Pemberton* in the case I have cited in the margin ; for (says he)

A. for life, and other limitations, not affecting the present question, to the use of trustees and their heirs in trust, for such child or children of the body of *A.* on the body of the said *B.* to be begotten, for such estates, and in such proportions as the said *A.* should, during his life, by any deed in writing, or by his last will under his hand and seal, to be executed, &c. direct, limit or appoint, and in default of such appointment, then to the first and other sons of *A.* and *B.* in tail, &c. There were issue of the marriage one son, *J. D.* and four daughters. *B.* died in the life-time of her husband. Then *A.* devised the settled estate to the use of his son *J. D.* for life, without impeachment of waste, remainder to trustees to support contingent remainders, remainder to the first and other sons of the said *J. D.* in tail general, with divers remainders over. And the question was, whether this appointment to *J. D.* was void? And Mr. Justice *Buller* on the second argument, after stating the power and the execution, said, he took it to be a clear rule of law on the execution of a power, "that the execution must have a reference to the power itself; and that a person claiming under the execution, takes under the deed by which the power is created; and therefore that the uses limited by the power must be such, as would have been good, if limited by the original deed." "If that rule were law" it put an end to the case :

he) the several limitations of a devise of one and the same thing, shall never be made to operate

case (meaning it put an end to the case as to the claim of the issue of unborn children as purchasers.) But that *eminent Judge*, proceeding to shew that the claim of the plaintiff in that case could not be supported, observed as one ground, "that *J. D. took an estate tail under the will, in order to give effect to the general intent of the testator.*" He said "that the question whether or not the son took an estate tail under the will, depended very much on the cases of *Chapman and Brown*" (herein after stated) and *Pitt v. Jackson*. (*Supra*).

He observed that the grounds on which the Master of the Rolls seemed evidently to have gone in the latter case, were decisive, although the expression attributed to him in the report was not accurately taken "*that the whole appointment by M. S. in the will was void*" and yet that she took an estate tail under it. That determination must have been on this principle, "*that where there is a general and a particular intent, and the particular one could not take effect, the words should be so construed as to give effect to the general intent.*" "The doctrine of *cy pres* went on that principle." The Master of the Rolls grounded his opinion on the case of *Chapman and Brown*, where the court said, "*that as the will could not operate so as to give an estate for life, to the unborn son of R., who was an*

operate several ways (*viz.*) some by way of executory devise, and others by way of remainder.

unborn son, with an estate in tail to his issue, then that unborn son should take an estate tail."

And Lord Kenyon, Ch. J. and Mr. Justice Grise, in the case of *Griffith and Harrison*, stated in a subsequent part of this note, were of opinion, that this doctrine of *cy pres* was applicable to cases of this nature, and had been so considered by high authority.

But in the case of *Bristow and Ward*, 2 *Vez. jun. Rep.* 136. Lord Thurlow seems to have received it, with a qualification of its applicability to *such* cases only, in which the objects of the power were tenants in tail, under the limitations over, in default of execution of the power.

In that case, money on marriage was agreed to be invested in *South-sea* annuities, upon trust, after the death of the husband and wife, to apply the capital in such manner as the husband should appoint, by any deed or writing attested as therein mentioned, and for want of such appointment to be divided as therein expressed. Afterwards part of the sums was laid out in lands, which was settled to several uses.

There were eleven children of the marriage. The husband died, having previously by his will,
and

mainder. The court seemed to admit the truth of the position; but it may be worth while

and in pursuance of the power given by the marriage articles, appointed, after the decease of his wife, to his eldest son *Henry* for life, and after his decease to and among any child or children, issue of the marriage of his said son with his then wife, in such shares and manner as his son should, by any deed, &c. or by his last will and testament, &c. direct or appoint. And one question was, whether the appointment to the children of *Henry* could be supported? And the Lord Chancellor (so far as is material to the point now in discussion, observed) that this case differed materially from *Pitt* and *Jackson*. Supposing that case to stand as a clear authority, it would not enable him to do the same thing here, for there the limitation of the will was to *M. S.* for life, remainder in tail to her children as purchasers; she being entitled, under the settlement, to a vested estate tail, subject to be divested by the appointment. Therefore there was not that difficulty, which was in the present case, in construing, that she reduced her interest, that her children might take estates tail by purchase; and that might be executed *cy pres*, by letting the estate tail she had, exist, so as to carry over the benefit to her children. Here it was a power to *Henry* to appoint to children, in such shares as he thought fit. No estate tail was given; nor was any intention of that sort expressed; but the children would take either by the appointment,

while to consider upon what reasons it is grounded, for in the course of practice, questions

ment, or for want of it distributively *per capita*. Therefore that did not apply; and he was under the necessity of saying, the interests to the children of *Henry* could not, in any respect, take effect either as to the land or the money.

In this case Lord *Thurlow* seems to have narrowed the ground on which Lord *Kenyon* decided the case of *Pitt v. Jackson*, in a degree not warranted by the decision itself, by considering the circumstance of the daughter being intitled under the settlement in that case to a vested estate tail, subject to be divested by the appointment, as the foundation of the decision; and, therefore, that it was only applicable to cases in which the same circumstance occurred, and in which, by rejecting the exercise of the power, so far only as the donee of the power reduced the daughter's interest to an estate for life, in order to give her children an estate by purchase, it produced the effect of setting up her estate tail again, which let the children in by descent, which was *cy pres*, and as nearly as could be to the estate limited in the exercise of the power.

But Lord *Kenyon* in deciding in *Pitt* and *Jackson*, did not confine himself to any such grounds; but merely alluded to the doctrine of *cy pres* as applicable,

tions frequently arise, which turn upon this very point.

With

ble, resorting to the case of *Chapman and Brown*, 3 Burr. 1626. as his authority.

Now the case of *Chapman and Brown* was rested by Lord *Mansfield* and Mr. Justice *Wilmot*, on the grounds stated by Mr. Justice *Buller*, in the case of *Robinson v. Hardcastle*; for in the case of *Chapman v. Brown*, the testator, after other devises, gave his estates to his nephew *William Brown*, eldest son of his brother *R.* and his assigns for life, remainder to his first and other sons in strict settlement, and for want of such issue, then to the second son of his said brother for life, and after the death of the said second son of his said brother *R.* then to the first son of the body of such second son of his brother, then lawfully begotten, or to be begotten, and to the heirs male of the body of such second son lawfully to be begotten, and for default of such issue, to the third, fourth and fifth, and every other son and sons of the said second son of the said *R.* (according to their seniority) and to the heirs male of the bodies of the said third, fourth, fifth and other sons of the said second son of the said *R.* lawfully to be begotten, the eldest, &c. to be preferred before the younger, &c. and for want of such issue, then &c. And the testator did declare, that the reason of his settling and limiting his estates as aforesaid, was, because he desired to have the same continue in his

With respect to the devise of a term, it is clear, that if there be 20 limitations of it after

name and blood, so long as it should please God to preserve the same. The testator's brother had only *one* son *W.* born in the testator's life time, but he had a *second* son *T.* born after the testator's death, and in the life-time of *W.* *W.* died without issue, and then the second son entered and suffered a recovery. And the question was, whether *T.* the second son, and who was not born till after the death of the testator, took an estate tail, or only an estate for life. And it was contended by those who argued against the recovery, that *T.* the second son was only intitled to an estate for life, for that though there was an ambiguity in wording the devise, to take place immediately after the death of *R.*'s second son, it evidently arose from a line being inadvertently left out by the person transcribing the will. The devise immediately after the death of *R.*'s second son, was "to the *first* son of the body of such second son, and to the heirs male of the body of such;" thus far the transcriber copied right, but here he plainly omitted the following words "first son lawfully to be begotten, and for want of such issue, then to the second son of the body of such second son of my said brother *R.* lawfully to be begotten, and to the heirs male of the body of such" if these words had been inserted, the clause they said had been quite clear, sensible, and methodical. These words they contended ought to be

ter a devise to one for life, &c. every one of the 20 will be equally executory as the first of them;

be supplied on the evident intention. On the other side it was contended that, as the devise stood "to the *second son* of *R.* for life; and after his decease, to the first son of his body, and the heirs male of the body of *such second son*," it was unquestionably an estate tail. But the Court, consisting of Lord *Mansfield* and Mr. Justice *Wilmot*, the other Judges being absent, held, that *T.* the second son took an estate tail; that they could not insert the limitations supposed to be left out, and as the will stood, there was no question in the case. But they said, if the omitted limitations could have been supplied by construction, they thought the *unborn son* of an *unborn son* could not have taken; and that, to effectuate the general intention of the testator, the word "*son*" should be construed a word of limitation, and an estate tail given to the second son of *R.*

The Reporter states the argument of the Judges at length, but the above is the principle deduced by him thereupon, and on *that* principle it is, that I conceive Lord *Kenyon* intended to ground his decision in *Pitt* and *Jackson*, and not to confine it to the narrow ground taken by Lord *Thurlow*, in the case of *Brislow* and *Ward*.

But in the before-mentioned case of *Routledge* and *Dorrell*, *supra* page 329. in note it was held,

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that

them; because all are equally limitations of a term after a disposition thereof for life, which

that the doctrine of *cy pres* was not applicable to cases, where the subject of the power was *personal estate*.

The facts material in that case to this point were, that *B.* appointed part of the *trust fund* (being money in the stocks) to her son *R. D.* for life, but with full power, in case of his marriage, to make a settlement of the said stock, or any part of it, upon his wife and the issue of such marriage, and after his decease, in case of no settlement, to and among all and every the child and children of *R. D.* in equal shares and proportions, if more than one, if but one, to such only child, at such ages and times as therein mentioned, if no children, at his death, or if all should die before they should be intitled, to *R. D.* his executors and administrators. And *His Honor* said, as to the appointment to *R. D.* the son, for his life, there was no doubt as to that; but as to the subsequent appointment of the fund, when it was clear that it was intended to go to his children, but if there should be no children, then to himself, and he being capable of taking the whole immediately, though his children could not take, he must feel great reluctance in declaring, that all his, *B.*'s disposition in favor of *R. D.* after his life interest, was void: but he was under the necessity of so doing. It was contended,

which cannot hold otherwise than by way of executory devise. Therefore the question can only arise in regard to the devise of a freehold;

(394)

contended, and that was the great difficulty, that, if the children could not take, upon the doctrine of *Pitt v. Jackson*, the intention was to be executed *ex pres*, and if it could not be executed in the manner in which the party had endeavoured to do it, the court would substitute some other mode by which it might take effect: He knew the doctrine in that case had by very great authorities been questioned. Lord *Kenyon* allowed it there, and in a similar case, *Griffith v. Harrison*, (*infra*) he had adhered to it, and was followed by Mr. Justice *Grose*. The other Judges did not negative that, but thought an estate for life only passed for other reasons. In *Bristow v. Ward*, the Chancellor avoided giving any opinion upon that: his Honor subscribed to the opinion of *Pitt v. Jackson*, as far as it was decided with regard to a real estate, settled to a person, who was an object of the power, for life, with limitations in strict settlement to persons not objects of the power, for that was decided in the cases of *Humberston* and *Humberston*, and *Spencer v. Duke of Marlborough*, but he (the Master of the Rolls) could not apply that to personal property. *Pitt v. Jackson* was a case of real estate. The first and other sons were incapable of taking as purchasers: Lord *Kenyon* thought that as it was perfectly clear, it was intended to go to the daughter and her issue, and they could not take as purchasers,

Vide supra,
pl. 303.

hold; and there we are to consider, that every executory devise is either the limitation of an estate

purchasers, to effectuate the general intent of the testator, it should be so moulded, and he relied upon *Chapman v. Brown*. He admitted, and he remembered attending the argument of that case in the Court of King's Bench and in the House of Lords, that it was not decided in the latter case, on that point. Lord *Parker* took advantage of the omission of a line. They did seem to avoid giving an opinion upon that point: but it was equally clear, according to the report, that Lord *Mansfield* laid down that doctrine, and he did not find much objection to it, viz. that where there is a limitation for life to a person unborn, with remainders in tail to the first and other sons, as they could not take as purchasers, but might as heirs of the body, and as the estate was clearly intended to go in a course of descent, it should be construed an estate tail in the person to whom it was given for life. This was personal estate, first given for life to the parent, an object of the power, then equally, or as he should appoint, to the children, who were not the objects of the power. He was desired to execute that *cy pres*. How could he do that? To effectuate such intention he could only give it to him absolutely, and then it would not go in a course of descent; but would go to his executors and be liable to his debts. In the case of a real estate, it was true the law enabled the party to defeat the estate tail; but an act must

estate after the fee has already been disposed of, or else is a freehold to commence *in futuro*,
without

must be done by him for that. If he died without doing that act, the estate went to his issue, but that was not the case as to personal estate. If he declared him intitled absolutely, his children would not succeed in any manner intended by his mother; but it would go to her (the father's) executor. Therefore this doctrine could not apply to such a subject.

The learning relating to powers of appointment, through the medium of which shifting and springing uses, and executory dispositions are frequently carried into effect, is so intimately connected with that branch of law upon which our author treats, that I trust it will not be deemed a departure from the main object of the original work, if I take this opportunity of offering some observations upon this abstruse, but important learning.

Powers of appointment are modifications of uses, whereby the owner of an estate is enabled, either to reserve to himself a qualified species of dominion distinct from the legal estate, or to delegate such qualified dominion to be exercised by strangers, whereby they may withdraw the legal estate out of the owner, or his assignees or trustees, and direct it to go in a different channel. Whether such power be reserved to the owner of the estate, or to a stranger, it
always

without any preceding freehold to support it.
In the first case it is evident, that every limitation

always operates first as a revocation of the uses, either declared or resulting on the original conveyance, then existing, and then by way of limitation of new uses. And whether such power be reserved to the owner, or a stranger, he acts in the exercise of it *instrumentally* only according to the power or authority reserved; and his appointee, so far as he comes in under the power, derives his title in consideration of law, not from the person exercising the power, but paramount, namely under the conveyance by which the power of appointment is created, just in the same manner as if the new use had been originally limited to such appointee in such conveyance *itself*, instead of awaiting the interposition of the appointment by the person to whom such power is reserved, whose appointment is only directory of the use, to which that conveyance is to enure; and such use when declared by the person exercising the power, is *fed* by the *seisin* of the *trustees to uses* in the *original* conveyance. It follows as a necessary consequence of these incidental qualities inherent in a power, that the uses *declared* in the *execution of a power*, must be *such* as would have been good *if limited by the original deed*, and that if such uses, if limited in the original deed, would have been void as too remote, and tending to a perpetuity, they will, for the same reasons, be void, though

tation subsequent to the first executory devise, must be also executory; because it is also

though declared by the instrument, whereby the power is exercised.

Accordingly we have seen in the case of *Robinson* and *Hardcastle*, stated in this note, that the declaration of the use in favor of the unborn child of an unborn child, as a purchaser, was void; because had such use been inserted in the original conveyance, it could not have been supported, but would have been void, as tying up the property beyond a life in being, and twenty-one years after.

In the case of the Duke of *Devonshire* and Lord *George Cavendish* stated 4 *Term Rep.* 741. which arose upon a case reserved at *nisi prius* on an ejectment to recover lands, belonging to the late Countess of *Burlington*, for the opinion of the court of King's Bench on the following facts; Lady *Burlington* being seised in fee of the messuage in question, gave and devised all her manors, &c. whatsoever, unto trustees and their heirs, to the use of her son in law *William Lord Cavendish* for life, remainder to trustees to preserve Contingent Remainders, remainder to the use of such of his child or children, by *Charlotte Lady Cavendish*, his late wife, for such estate and estates and in such shares and proportions, and under and subject to such powers, provisions, conditions, restrictions

also a limitation of an estate after the fee has already been disposed of. In the latter case, the

tions or limitations as he should by deed in writing signed and attested by and in the presence of two or more credible witnesses, or by his will so signed, &c. nominate, direct, limit, or appoint, and in default of such nomination to the use of *all and every the child and children* of the said *William Lord Cavendish*, by the said *Charlotte Lady Cavendish*, equally to be divided between them, if more than one, share and share alike, to take severally as tenants in common and not as jointenants, and of the several and respective heirs of the body and bodies of all and every such *child or children*, lawfully to be begotten "with cross remainders, between such children," and for default of such to the use of *William Lord Cavendish*, his heirs and assigns for ever." With a power to Lord *William* to lease. *At Lady Burlington's decease*, *William Lord Cavendish* (afterwards Duke of *Devonshire*) had issue THEN living (*William Lord Cavendish*, and now Duke of *Devonshire*) *Richard Lord Cavendish*, and *George Lord Cavendish*, and *Dorothy* the late Dutcheß of *Portland*. *William Lord Cavendish* entered by virtue of Lady *Burlington's* will, and remained in possession till his death. Previous to his decease he made his will, whereby he gave and devised unto his brother *George Cavendish* and *Frederick Cavendish*, (among other things) all such real estate either in possession, remainder, reversion, or expectancy, as he had power

the first *executory* limitation, being the first freehold limited by the will, no freehold can vest

to dispose of either by the will of *Dorothy Richmond deceased*, (*Lady Burlington*) or of his own or late father's purchase, or otherwise howsoever, and also all money, &c. (except such part as he should thereafter bequeath to his eldest son) in trust that they did pay and appropriate unto the use of his daughter *Dorothy* 30,000 *l.* he then directed them to lay out the remainder of his personal estate in land or government securities, for his two younger sons *Richard* and *George Cavendish* in equal shares, until the younger attained twenty-one years, and then to make an equal partition and to stand seised as to one undivided moiety, to the use of the said *Richard* for life, remainder to trustees to preserve Contingent Remainders, with remainder to trustees for 500 years, remainder to the first and every other son of *Richard* successively in tail male, remainder to his son *George* for life, remainder to trustees to preserve Contingent Remainders, remainder to trustees for 500 years, remainder to the first and every other son of *George* successively in tail male, remainder to his eldest son *William Cavendish* his heirs, &c. for ever. The like of the other undivided moiety, *mutatis mutandis*. And he declared the trust of the said several terms of 500 years to be for the purpose of providing jointures, and younger children's portions, for the wives and children of *Richard* and *George* in such manner as therein mentioned. The

testator

vest in possession under that will, before the time appointed for such limitation to take effect;

testator *William Duke of Devonshire* died leaving issue *William* the present Duke, *Dorothy* late Duchess of *Portland* the lessors of the plaintiff, *Richard Lord Cavendish*, and the defendant *Lord George Cavendish*. The question was whether the will of the late Duke of *Devonshire* was a good execution of the power given to him by the will of *Lady Burlington*, or to any and what extent. Lord *Mansfield* delivered the opinion of the Court. And the first point determined was, that the plaintiffs deriving great benefit under the Duke's will, were bound to acquiesce in his dispositions throughout, and consequently to suffer a recovery or make the title of the defendant complete. 2dly. That the appointment was good to *Lord George* for life, and therefore this ejectment was premature. But as to the 3d point considered, and which is applicable to our present subject Lord *Mansfield* delivered his sentiments, as follows, "but the last ground of consideration, and which is what the case is particularly adopted to, is whether the power was well executed. As we are all of opinion with the issue unborn, and all other parties are of age, and desire our opinion, we think for the satisfaction of the family, we ought to give it, though it is not necessary. All powers must be executed according to their meaning. When a power is given to allot amongst particular objects, the party cannot give it to other objects.

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effect; if it could, then would that supposed executory limitation be really *not* executory, because

All the cases went on that ground; "whether the person giving that power meant it should be extended so far as the execution went," *Alexander v. Alexander*, 2 Vez. 640, was no more. *Maddison v. Andrews*, 1 Vez. 57. No conclusion could be drawn from *Alexander v. Alexander* that "children" may not, in some cases, be extended to "grandchildren" and "great grandchildren." *Wythe v. Blackman*, 1 Vez. 196. shews it may. There are three grounds, from which we are of opinion that this is a good execution. 1st, From the subject matter of the power. 2dly, From the limitations over for want of appointment. 3dly, From the words in which the power is created. 1st, This is not money, nor to be turned into money nor portions. It is a limitation of a family estate, how it shall go after her death. She considered how it should go, being determined it should go among grandchildren. Suppose she had only said at the time of making her will, "that she meant it to go to the grandchildren, it must have been inquired whether absolutely or in strict settlement;" if so, her answer must have been "in strict settlement." There are two kinds of settlement, one by which the issue of the person to whom the first limitation is made, shall certainly take, by giving the first taker only an estate for life, the other by creating an estate-tail in the first instance. But then there is a trick in law, by which

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cause it would in that case be supported by a preceding vested freehold.

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when the issue arrive at twenty-one, the entail may be barred. If this had been represented to Lady *Burlington*, her answer would have been, that she was sorry for it, as it might be a mean of defeating her purpose: but then it would be answered to that again, that there was a trick against that, to make a strict settlement. That was meant; but to guard against all, events she said, "I will put the father in my place, and give him authority, if he chuse to execute it;" if the words "in strict settlement" had been used, no body could have doubted her meaning. Now all the words in the language, except those, are used to carry this power as far as possible, and to shew that she meant an appointment in strict settlement. *Whatever he might do with his own estate he might do with this*; that was her intention, ONLY that the children were the objects. What is the use of Powers? It implies a strict settlement, with power to make jointures, leases, and raise portions.

Partial objections have been made, which it is not material to go into; as that the Duke of *Devonshire* could not take a reversion in this case, and *Alexander v. Alexander*, was cited, in which case the Master of the Rolls was of opinion that a reversion could not be given; but why? Because it was meant

It is true, that in relation to *contingent remainders* a subsequent remainder may vest
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Vide *supra*
p. 160.

as a portion; but this was not so. Another objection was, that the power could not be delegated. That was a good maxim, but it did not apply to this case; for Lady *Burlington* did not fix the power of jointuring, but gave authority to the Duke to give the power. He made the power, and therefore there is no delegation. On all the grounds, we are of opinion with the defendant.

The judgment in this case, seems rather an extraordinary one, not only from the circumstance, that it was admitted by the Court, not to be necessary, as well in respect that the parties interested had accepted benefits under the will, which precluded them from disputing the validity of it, as that the investigation of its validity was premature, but likewise because, if the adjudication be law, at the same time, that it admits the principle which had previously been laid down respecting the mode in which powers of this nature ought to be exercised, *viz.* "that such particular power, in its execution, must be confined to the objects prescribed therein," it (the judgment) by a curious and most refined species of argument, determines, in opposition to the practical conclusion, to be deduced, from the previous cases on the application of that principle to such objects; for

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in interest before a preceeding contingent remainder, as I have before observed when I was

it had been decided in a series of cases, * that where *children* are specified, *grandchildren* are necessarily excluded, and it seems, *à fortiori*, that no appointment could be made through the medium of trustees, if the trustees were not objects of the power; but in this case, both these principles are, in practice, over-ruled; for trustees, not objects of the power, were the parties first named to take, and the remainder in tail was limited to grandchildren, whereas children alone were the express objects of the power. In the next place, the testator created terms for years in trustees for the purpose of providing jointures for wives and portions for younger children, the effect of which, as to the wives, was not only to give a part of the estate to a stranger, the wife of a child, where the power was, in express terms, limited to be exercised in favour of children, but delegating the power of appointing reserved to the Duke (the devisee of the power) to the children of the Duke, who were to name the objects, who should take jointures under the power, and which objects were strangers to the power. The Court asserts the principle, that "where a power is given to allot amongst particular objects, the party cannot give it to other objects," and that all the cases went on the ground,

* *Vide* *Madison v. Andrews*, 1 *Vez.* 59. *Alexander v. Alexander*, 2 *Vez.* 640. *Adams v. Adams*, *Cooper* 651.

"whether

was treating of contingent remainders; but that is only where some preceding freehold vests

“whether the person giving that power meant it should be extended, so far as the execution went.” Now the power in this case was expressly limited to the use of such of his child or children by *Charlotte Lady Cavendish*, for such estate, &c. as he the Duke should appoint. But it is said by the Court that, from the subject matter of the power, “children” were not the only persons meant. But the circumstance, of the power leaving the subject divisible among all the children, and not confining it to a single child, seems to favour the conclusion, that no other objects were in the contemplation of the Dutchess than children; for extending it to more than *one* child, furnishes very strong ground, for contending that a strict settlement or maintaining *the dignity of a family* by keeping the estate *intire*, which is the only ground of inference, furnished by the subject *being land*, was by no means in the mind of the creator of the power; for a division of the property between a variety of persons shews that maintaining the dignity of a family was not the object, and leads to a conclusion that the creator of the power, meant the land to be divided, as if it were money. The limitations over for want of appointment, are likewise relied upon as a ground for extending the objects beyond children; but the limitations over in default of nomination, being to the children of the Duke by Lady,

Vide supra,
p. 206.

and Reeve

v. Long.

4 Mod. 282.

et Vide 1

Atk. 597. 1

Veaz. 269.

vests in possession in the mean time : but no subsequent remainder can first vest in possession,

Cavendish, equally to be divided between them if more than one in tail, with cross remainders between them (so far as they go) seem to me to operate in favor of the conclusion that all the children were equal and indifferent objects of the testatrix's bounty, and that she was not anxious how they took the property, so long as they or one of them had it. The third ground of argument relied upon in the judgment is drawn from the words in which the power is created. But as to the words of the power, *though the power proceeds* "for such estate or estates, and in such shares and proportions, and under such powers, provisoes, conditions, restrictions or limitations, as the donee of the power shall appoint," those words seem to be referable to the quantity and quality of the estates to be given to the children. They were so considered in the case of *Adams v. Adams*. They leave in the donee of the power a discretion, as to the extent of interest in, share or proportion of, and qualification or condition under which the subject should be held, but by whom; *by the children*, the express objects of the power. The conclusion that Lady *Burlington* meant to include grandchildren among the objects of the power, is drawn from a singular source; for the court first supposes that the testatrix meant it to go to grandchildren, although no proof is furnished, upon which to ground that supposition, and then the Court suggests what inquiry must then have

sion, and afterwards a preceding estate take place; for wherever a subsequent limitation vests (395)

have been made; but as grandchildren were not mentioned by the testatrix, except in default of appointment, and to take through the medium of children, as tenants in tail, how do the circumstances of the case warrant the supposition; and if the supposition is not warranted, what becomes of the suggestions founded on that supposition?

The Court in the above case of *Devonshire and Cavendish*, cite the case of *Wythe v. Blackman*, 1 *Verz.* 196. also reported *Ambl.* 555. as an authority that the description of *children* may, in a will, be extended to *grandchildren* and *great grandchildren*; but that case turned upon the circumstance, that the word *issue* and the word *children* may be used in the same sense; that in the will then in question, they *were* used in the same sense; that the word *issue* would extend to all the descendants; and that in that case the words "issue" and "children" being used indifferently, the word "children" should be extended, so as to enable all the children, grandchildren, and great grandchildren to take; and they took *per stirpes*, and not *per capita*.

And the case of *Gale v. Bennett*, *Amb.* 681, was decided on the same ground.

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But

vests in possession before a preceding contingent one can arise and vest, such preceeding one

But it is observable on both these cases, that the grandchildren and great grandchildren were set in the places of their parents, being considered as persons capable of taking under the description of issue at the time when the appointment was made, and that they took the whole subject immediately among them; that is the children, grandchildren, and great grandchildren took their respective shares; the grandchildren and great grandchildren taking *per stirpes*, what their parents would have taken as "children."

And it had long before been settled, in the case of *Crooke v. Brooking*, 2 Vern. 2. which has, in a variety of subsequent cases been admitted to be law, that although where there is no child, grandchildren may take under a devise to children, they never can where there is a child.

That was a devise of money to trustees, for such uses as the testator had declared to them, and by them not to be disclosed. One of the trustees by a letter to the other, stated the trust to be, that they out of the profits should allow *A.* a maintenance for her livelihood during her husband's life, and if he died before her, she to have the money at her own disposal, but if the husband survived, the money to go amongst her sister's children, as she should advise.

A. died

one is utterly precluded and destroyed, as we have already seen.

But

A. died in her husband's life-time, having only one sister, *G.* the mother of *H.* without giving any advice or directions touching the disposing of the money. *G.* had only one child *H. D.* at the death of *A.* but had five other children living at the death of the testator, some of whom died leaving children. And the question was, whether *H. D.* the only child of *G.* should have the whole, or whether the grandchildren, to wit, the children of the deceased children, should come in for an equal share.

And it was decreed, by the Lords Commissioners of the Great Seal, that *D.* being the only child living at the death of *A.* should have the whole; and it was said that the only difficulty in this case was the word "children" and here was but *one child*; but they were clear of opinion, where the devise is to children, the grandchildren cannot come in to take with the children. But they admitted that if there had been no child, the grandchildren might have taken by a devise to children.

The answer to the objections made to the execution of the power in this case of *Devenshire* and *Cavendish*, appear to me as little satisfactory as the reasons in support of the judgment in favor of it seem to me unfounded. Two only of these objection are stated in the judgment, *viz.* 1st, That the duke could not take a reversion; in support of which

But in the case, now under consideration, there is no freehold limited to vest immediately

which proposition the case of *Alexander and Alexander* was cited. The answer suggested by the court is, that the case did not apply, for there it was meant as a portion. It appears to me that, so far as we may judge from the power itself, and limitation over in default of appointment, this provision was meant to operate in the nature of portions: From the power itself, because it enabled the donee of the power to make a division of the subject among all the children: From the limitation over, because it divided the subject among the children, which in fact is portioning them. But the same decision as to the incapacity of grandchildren to take under a limitation to children, was made in the case of *Adams and Adams* in which case portioning was out of the question. The second objection was, that the power could not be delegated. That is admitted to be "a good maxim," but it was said it did not apply to this case; for *Lady Burlington* did not fix the power of jointuring, but gave authority to the Duke to give the power. He made the power, and therefore it was no delegation. This answer seems to me begging the question. For the point was, whether *Lady Burlington* did give the Duke authority to give the power of jointuring and portioning. No ground for the assertion that she did, being made out by any argument offered in the judgment, the assertion rests merely

ly in possession. We cannot make the preceding estate and the remainder change places, and

merely upon an assumption without premises to support it.

As this judgment was clearly extrajudicial, being both *unnecessary* and *premature*, and as it opens a new field of construction applicable to instruments used in the exercise of powers, I trust that I shall not be considered as having taken too great a liberty in strictly examining the grounds on which it stands, which will enable us to decide how far it may be considered as *an authority* on the subject of powers.

The case of the Duke of *Devonshire* and *Cavendish* has acquired a *character* amongst decisions upon such particular powers, by the frequent occasions that have occurred of distinguishing it from cases, where appointments have been made in favor of the unborn issue of unborn persons (objects of powers) which unborn issue have come into *esse* after the period, when the instrument creating the power became complete; for when in cases of the latter description, this case has been cited in favour of grandchildren so circumstanced, it has been distinguished on the ground, that in the case of the Duke of *Devonshire* and *Cavendish*, the grandchildren, claiming under the power, were born before the will was consummate by the death of the testator. And this conclusion has raised a distinction between

and the latter come into possession before the former; this would be absurd, and directly
contrary

tween such powers created by deed and such powers created by will; for a *deed* speaks from the *execution* of it, a *will* from the *death* of the testator; and therefore where the power is created by will, and the objects are clearly the issue of persons unborn when the will is made; such issue, if born before the will is consummate, are not open to the objection of incapacity, on the ground that they could not have taken as purchasers, if deriving their title under an express limitation *in the will*, instead of under the *exercise* of a power therein contained. Beyond this point, the case of which we are now speaking, seems to me to be no authority, for beyond that, its authority is greatly weakened by the case of *Griffith v. Harrison*, 4 Durnf. & East Term Rep. 777. in which case a similar question was agitated.

This was a case from the court of Chancery. *A. B.* by a codicil in his will, gave and devised a certain farm and premises, purchased after making his will, called *V.* unto his wife for life, and after her decease "to such child or children of him the devisor, as she should judge most proper to bequeath the same to by her will." *A. B.* by another codicil ratified his former will and codicil, and devised his estate called *V.* to the use of *F.* his wife for life, and directed and impowered her to give and devise the same to any one or more of his said child

contrary to the order of the limitations. If this cannot be done, then no one of the subsequent

child or children by her, in such manner, share, and proportion, as she should direct and appoint in and by her last will in writing duly executed, but so as the said estate should not be divided, but transmitted whole and entire to his heirs; he thereby also devised other hereditaments adjoining, since accrued to him, unto his wife for life, to be enjoyed by her as part of his said estate called *V.* and to be annexed thereto, and he also directed and impowered his wife to devise and bequeath the same to any such one or more of his said children, as she should appoint and direct in and by her last will, and declared his will and intention to be, that the said estate and lands called *V.* and the said other estate thereto adjoining should be considered as one estate, and be transmitted intire to his family; and also declared that in case his wife should not execute her will in due form, or should neglect or omit to make such appointment and devise as aforesaid, he thereby devised the same premises, and every part and parcel thereof to the use of his own right heirs. *A. B.* died leaving a widow and five children, all of whom were living at the time of his making the codicils, to his will. *F.* his wife, survived him, and afterwards died, having first made her will, whereby, in virtue of the powers and authorities to her in that behalf given, she gave, devised, directed and appointed to her youngest son *G. G.* all the estates comprised

sequent limitations can take place before the time limited for the first; they are all therefore equally

comprised in the devise and power of appointment, to the use of her said son *G. G.* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *G. G.* successively in tail, remainder to his first and other daughters in tail, remainder to her eldest son *M. G.* and his first and other sons and daughters in like manner, with like remainder to the other children. *G. G.* survived his mother and died an infant without issue. *M. G.* after the death of his brother, contracted to sell the estate, the title was objected to. And on a bill filed for a specific performance, the question sent for the opinion of the court was, what estates each of *A. B.*'s children took respectively in the premises in question.

The Court took time to consider the case, and being divided in opinion, certified as follows,

Lord *Kenyon* and Mr. Justice *Grose*, certified that the operation of the will, of *F. G.* must be confined within the limits of the power given her by her husband. He impowered her to give, devise and bequeath to any one or more of his child or children, in such manner, share and proportion, as she should by her will direct and appoint.

equally freeholds to commence *in futuro*, without any present limitation or estate of freehold

His child or children are the only objects mentioned in the power; and we think it clear that she could not make any other person a purchaser of any interest in the property. The whole of the execution of the power must be exhausted upon the children. The execution, which she has attempted, takes in persons who were not children of the testator, and affects to make them purchasers; and is not only not warranted by the words of the power, but might give a descendible quality to the estate to persons out of the testator's view, *viz.* to the heirs *ex parte maternâ* of the children of the sons, and *ex parte paternâ* of the children of the daughters.

But although the appointment cannot, as we conceive, take effect in the particular manner the widow intended, yet her general intention being that the children of her several children should take estates of inheritance in tail general, on the death of their respective parents, we think that that general intention should be carried into execution, as far as the power given by her husband will allow; and consequently that G. G. the son and his brothers and sisters, respectively took estates in tail general. This construction we think fairly warranted by great authorities.

Mr.

hold to support them; and consequently are all equally executory, till the time comes for the

Mr. Justice *Asbhurst* and Mr. Justice *Buller* certified to the effect following,

In the execution of powers the material object to be attended to is, the intention of the person creating the power; and that intention is to be collected from the words of the will, or other instrument, giving the power, according to the ordinary and common acceptance of the words, and not according to any legal or technical exposition of them.

A settlement on a child for life, with remainders to his first and other sons in strict settlement, is in common parlance a settlement on the child; and the general intention of persons, who look forward to future settlements, is that the estate shall be tied up as long as the rules of law will allow.

The question is, Whether the words used in this will sufficiently indicate that intent; and we are of opinion that they do. If the words "in strict settlement" had been used, the case would have admitted of no doubt: and we think the words "manner" "share" "proportion" "and transmit" are equivalent to them. The wife having a power of settling the estate among the children in such manner as she thought fit, it was as extensive as if every

the first estate to vest or fail; then all the subsequent limitations *to persons in esse and ascertained* * may vest, and no longer continue executory.

Thus

every manner had been expressly enumerated, or the testator had said "in strict settlement or otherwise" besides the word "transmit" in our judgment most naturally applies to a strict settlement, and means that the remote descendants of the testator, as far as the law allows, should take by the gift of the wife, and not by descent.

The word "children" has been held to be co-extensive with issue, and to include grandchildren, and great grandchildren, both in law and equity; as we find in *Wild's case* 610. *Bendloe* 30. and *1 Vent.* 231. We think the intention of the testator in this case requires that construction, and that the testator used the term "children" as denoting the branches sprung from them. The expressions that it was his will and intention "that the estate called *O.* and the other estate adjoining, should be considered as one estate" and be "transmitted entire to his family" confirm our opinion.

The case of the Duke of *Devonshire* against *Cavendish* seems to us to be in point: And the language there used by the Court was that whatever the person to whom the power was given, might do with

* *N. B.* The words in Italics interlined by Mr. *Fearne* in his copy.

Thus were *A.* having two sons *B.* and *C.* devised lands to trustees for 500 years, upon trust

the estate, if it were his own, he might do now; with this exception only, that the children were the objects.

But supposing the estate could not, under the power, be strictly settled on the issue of the children, yet we are of opinion that *M. G.* cannot make a good title to the estate.

There is, *prima facie*, a contradiction in the power, which first enables the wife to give to one or more of the children, in such proportion as she thought fit, and afterwards adds the restrictions that the estate should not be divided, but transmitted whole and entire to his heirs; for if the estate were always to remain entire, it could not be divided into different proportions. The only way of making the different parts of this power, consistent (provided the estate cannot be limited in strict settlement,) is to consider the word "heirs" as applicable only to more remote descendants than the children; and to confine the wife's power of appointment to the children during their lives only; in which case whatever appointment the wife might make amongst the children, during their lives, the estate, after their deaths, would go entire to the right heir of the testator. If the testator delegated this power to the wife merely to secure the obedience of the children to her, this construction will answer the end.

In

trust to pay an annuity of 50*l.* *per annum* to B. for life, and after the determination of that term

3P. W.
Gore v. Gore.

In either way we are of opinion that M. G. took only an estate for life in possession.

It is necessary to observe that Mr. Justice Buller and Mr. Justice Ashurst were judges of the court of King's Bench, when the case of the Duke of Devonshire and Cavendish was decided. So that their support on this occasion, gives no additional sanction to the principles of the judgment, delivered in that case.

We must take care in the application of the distinction which has arisen since the case of *Devonshire* and *Cavendish*, between *deeds* and *wills* in which such particular powers are created, as to the time of the birth of the person capable of taking under such power, to confine it to the instrument creating the power; for this distinction applies only to the instrument creating the power, and not to the instrument by which the power is exercised; for, if a mistake is made in the exercise of the power in this respect, the objects of the appointment may be totally disappointed; and on this point, there is an *ambiguity* in the note of which we have before spoken *Co. Lit. fol. 271 b.* for the learned editor has stated the principles upon which this distinction is grounded with his usual neatness, but in illustrating his proposition by examples, he

term to the first and other sons of *B.* in tail, remainder to *C.* for life; *B.* at the testator's death

has *confused* the case of a deed or will in *exercise* of a power, with that of a deed or will *creating* a power. "If therefore" says the note "in a deed *exercising* such particular power (meaning a power to appoint to children unborn) there is a limitation for life to a person unborn, with remainder over to his sons in strict settlement, these remainders over will be void, and will not be helped though a son is born on the following day.—In the case of a will it is different. If the son is born in the party's life, he is capable of a limitation to himself for life, with remainder over to his son in strict settlement." Now the case of a *will*, as here put, is of a *will* in *exercise* of a power, in which respect in the case of a will, as well as in the case of a deed, the limitation over to the sons of a person unborn at the time of the creation or *consummation* of the power, but born before the will, executing the power, was consummate by the death of the *donee of the power* would clearly, as in respect to *this* distinction, be void, although a son was born the day following the making such will in *exercise* of such power. This gentleman therefore must have meant to speak in his examples of *birth after* a deed or will *creating* the power, and not *after* a deed or will *exercising* such power previously created.

In the case of *Routledge* and *Dorrell* above stated, the owner of the power (the mother) in consideration

death had never had a son born ; here it was held that till the event of *B.*'s having a son should

tion of the marriage of her daughter, by the marriage settlement, executed according to her power, to make some provision for her son-in-law, and daughter and her issue, by virtue of the power, appointed one thousand pounds, part of the money, subject to the power, to her daughter *E.* immediately after her the mother's decease, to be transferred to trustees upon trust, for her intended husband for life, in case he should survive the mother, and after his decease for his wife for life, in case she should survive him, and after the decease of the survivor for all and every the child and children of the marriage, in such shares and proportions, manner and form, upon such conditions, and under such restrictions, and at such time and times as her son and daughter should appoint, and in default of appointment, equally, with survivorship; and if there should be no children or all should die, before they should be intitled, to the survivor of her intended son and daughter his or her executors and administrators. And one question was, whether this appointment was good within the power and the rules of law, being an appointment (in consideration of the intended marriage of the daughter) of a certain portion of that of which the daughter might have been made the appointee; but settling that so as to give interests to persons, who could not have been objects of a direct appointment? And his Honor was of opinion, that wherever there is a power to ap-

should be decided one way or the other, by the birth of such son, or by B.'s death without one,

point among persons capable of such appointment, and they come *in esse* at the particular times to make the appointment good, a sum appointed, as in this case, to the daughter upon marriage, though modified with respect to the objects of the marriage, was a good appointment, *not to the objects of the marriage*, but to the daughter herself; and this appointment was a good appointment to her, *though if it had been done by will, and independent of any modification introduced by the daughter*, it would not have been good; because the husband and children of the marriage, born *after* the death of their grandmother, were not immediate objects of appointment. *Therefore it was just as if it was appointed to her, and she had settled it so with the husband.*

Powers of appointment of this nature may be divided into general powers, and particular powers.

A general power of appointment, is distinguishable from a particular power of appointment, inasmuch as the former, enables the party to appoint the estate to *any persons* he thinks proper *having a capacity to take under a power*, whereas the latter restrains him to *particular objects*, as the children of the party himself or of any other persons specifically described.

General powers may be considered as in two predicaments, *viz.* where the powers are reserved by the owner of the estate, retaining at the same time

one, the freehold descended to the devisor's heir at law. Therefore till the birth of such son

(396)
Vide infra.

his original ownership by a *resulting use*, or *express limitation* of the fee to himself; and powers reserved by the owner on aliening the estate for a good consideration, as marriage, or the like, or to a stranger in consideration of money.

But whether such general powers be in the first or the second of these predicaments, it appears to me, that if the act be merely and abstractedly an exercise of the power capable of taking effect by virtue of the power only, the principle before laid down, "that the uses limited by the power, must be such as would have been good, if limited by the original deed," applies with equal force to a general, as to a particular power; for if it were otherwise, such general power of appointment might, in the execution of it, have the same tendency to a perpetuity, as a particular power; for we are to observe that a general power while the estate is unexecuted in the appointee, suspends the absolute alienation of the subject on which it attaches by the persons in whom that subject is vested, whether it be the owner or a stranger, in the same degree as a particular power; for whenever the estate is executed in the appointee the uses before vested are divested, and diverted into a different channel, so that no disposition can be made by those who are possessed of the legal estate, while the power hangs over it, which will not be subject to its operation.

son or *B.*'s death without one, *C.*'s remainder must have been executory, being a freehold limited

Thus if *A.* owner of an estate in fee-simple in lands, were to limit them to the use of such person or persons (*generally*) for such estate or estates, &c. as he (*A.*) should appoint, and in the mean time, and subject to such power, to the use of *B.* in fee; and then *A.* exercised his power in favour of *C.* * a person unborn at the time of the creation of the power for life, remainder to his first and other sons in fee, so as to make the sons of *C.* take by purchase; he would thereby be enabled to tie up the property, beyond the period of a life in being, and twenty-one years after, computed from the time at which the instrument creating the power bore date (which is the point of time to which our attention must be directed) in the same manner as if such declaration were made in the exercise of a special power; for in such case, if the appointment were valid, no complete alienation could take place, until the unborn issue of the son of *C.* (if any) he (*C.*) being unborn at the time of the creation of the power, attained twenty-one. Or taking it in another point of view, the person in whom the fee is vested, subject to the power, could not alien his estate, but subject to be divested by *C.*'s issue (if any) and such issue would take the fee-simple, under the power, as purchasers though the unborn issue of a person unborn, at the creation of the power.

* *N.B.* A capital is inserted merely to distinguish the first appointee.

limited to commence *in futuro*, without any preceding estate of freehold to support it; for the

I am aware that such general power is viewed in a different light in the additional note to which I have so often alluded, *Co. Litt.* 201 b. in which a general power, and a particular power are distinguished by the circumstance "that the former enables the party to appoint the estate to any person he thinks proper" and it is said "that a general power of appointment has no tendency to a perpetuity, as from its nature, it enables the party to vest the whole fee in himself or in any other person, and to liberate the estate intirely, from every species of limitation, inconsistent with that fee. In fact therefore giving a person such a power is nearly the same as giving him the absolute fee. The only difference is, that it enables him to do, through the medium of a seisin previously created, that which, if the fee had been actually limited to him, he might do by a conveyance of the land itself." "So that in both cases his power of alienation is of the same extent." "But in case of a particular or qualified power, where the objects are limited, the case is intirely different. The limitation of the objects takes the land out of commerce, and of course has a tendency to that perpetuity, which the *English* law of real property does not admit."

The author of these notes in this passage has considered the mode in which a general power may be executed, as a peculiar quality or property of such power; whereas it is no peculiar property or quality of such

the freehold descending to the heir at law of *A.* was no part of the limitation in the will; but only

general power that it may be executed in fee, and if it were, that would not remove the objection, that the period at which the estate is to vest, if there were no restriction, as to the capacity of the person to take as a purchaser, in respect of his being or not being in esse at the time the power is consummate, might be at any distance of time, however remote. A general power, may be executed for such estates, as the donee of the power thinks proper, so as the estates be within the limits allowed by law, and so may a particular power, if it extends over the fee, and the objects, in whose favour it is exercised, be such persons as the power prescribes. And if such general power be exercised in favour of objects, not capable by law to take otherwise as purchasers, from the contingency of their existence being too remote, the subject of such power, if the power be valid, is thereby taken out of commerce, in like manner and the power in effect, has the same tendency to a perpetuity, as the same kind of limitation by a special power, when so executed. It makes no difference in the public regulation of property, whether the estate be, by the exercise of the power, vested in the unborn child or children of the unborn issue of a particular person or particular persons specified in, or whether it be thereby vested in the unborn child or children, of the unborn issue of a person unknown, until pointed out by the donee of the power; the effect upon commerce will be the same, and consequently the legal objection to that mode of exercising the power equally forcible.

Indeed

only descended in consequence of its not having been thereby limited, and therefore had
no

Indeed where the general power of appointment, and the legal estate, are vested in the same person by the deed creating the power, and limiting the legal estate, the inconvenience of a perpetuity will be prevented upon another principle of construction, namely, that if the donee of a power, and possessing the absolute legal interest in the subject, disposes of part of his interest in the subject for a valuable consideration to take effect out of his interest, and then executes his power for a valuable consideration also, he will be considered as having extinguished his power, to the extent in which he has departed with his interest. But this principle is applicable only to the case of alienations for a valuable consideration.

And now I am speaking of powers, whereby the party who has a special or general power of appointment, and is also intitled to the fee, or to any particular estate, carved out of it, is enabled to divest uses previously vested, and whereby shifting and springing uses are carried into effect, and which, under different modifications, are become component parts of most settlements, in which property of any considerable value is arranged, I shall offer some observations on the nature and operation of deeds framed by conveyancers, for carrying them into execution. It has been observed that all powers, created for the purpose of giving effect to shifting or springing
uses,

no connection with C.'s remainder in the light of a preceding estate.

But

uses, or other executory limitations, take effect *primarily* by way of revocation of the old, and of limitation of new uses. Therefore, where, in a settlement, taking effect, through the medium of uses, a special power is reserved to the owner of the fee, or of some particular estate, carved out of it, or to any other persons for enabling him or them to sell or exchange, or make partition or demise, or the like, the deed for carrying the power into execution, according to the best forms, includes, not only an exercise of the power, but a conveyance by lease and release from the original trustees to uses, and the owner of the estate, or some particular estate carved out of it. This form of conveyance is pursued from the abundant caution with which those, who have practised in this line of the profession, have considered themselves as bound to act, and from a thorough knowledge of the *legal effect* of such powers, and the *operation* by which *that effect* is produced. For as the exercise of the power operates first as a revocation of the old uses, the consequence is, that the legal estate necessary to feed the new estates in the subject in which those old uses were limited, is restored to the original trustees to uses, freed and discharged from the uses previously declared, and, in contemplation of law, remains in those trustees, for an instant, ready to feed the new uses limited in the exercise of the power. Now, if, by any accident,

the

But here an observation is to be attended to, that notwithstanding the rule, that if one limitation

the limitation of the new uses should fail, then the legal estate, residing for the instant in the trustees, would pass by the lease and release, by way of immediate limitation, to the persons intended to take under the new uses declared by the power; and upon the same principle of abundant caution, the owner is made a party to such release, first, in order to take from him a legal conveyance of any particular interest limited to him by the old uses, and, Secondly, to supply any defect in the instrument out of which the power arises, in respect of the creation of the power, or the limitation of uses thereby subjected to the power; for if the power should be badly created, and the limitations in the original assurances void, the consequence would be, that the estate would have remained in the person, by whom the power was created, and the subsequent limitations were declared. The consequence is that this form of conveyance consists of two parts; First, an execution of the power, taking effect through the medium of the statute of uses; Secondly, a conveyance of the estate by transmutation of possession, taking effect, through the medium of a lease and re-lease, in which the lease takes effect, through the medium of the statute of uses, and the release by the common law; for a release upon a lease for years is clearly a common law conveyance, and not a conveyance executed by the statute of uses. It is upon these

tation be executory, every subsequent one must be so likewise; yet a preceding executory

these principles that it is considered as inartificial, to blend the execution of the power, with the release in the deed, executing the power; or to declare that the release is made in execution of the power; for such suggestion is incompatible with the nature of the assurance, and in truth destroys its effect; because in either of the latter modes of proceeding, the whole instrument is declared by the parties to operate through the medium of the power, and therefore to involve merely a proper and improper execution of the power (for all powers ought to be executed, in the words in which they are given) instead of an execution of the power, and a legal conveyance by way of transmutation of possession, to supply any defect in the original deed, creating, or subsequent instruments exercising the power.

Mr. *Butler* in his note upon this subject to which I have so often had occasion to allude, disputes the propriety of creating powers of this nature, by words authorizing the donee of the power (where the object of the power is to enable him to sell or exchange, grant, lease or demise) to *sell*, or *exchange*, *grant*, *lease*, or *demise*; that Gentleman considering that thereby the terms, expressing the operation of appointments and conveyances, are, both in the deeds creating the powers, and the deeds

tory limitation may be uncertain and contingent, when a subsequent limitation though it be

deeds by which they are exercised, confounded. Now it appears to me that the confusion may not be in the *terms* themselves, but in the *ideas* entertained in *respect* of the terms and their application. The creator of powers of this nature, is not meant to describe the operation through which the purpose of his delegation is effected, but what he delegates; therefore it seems to me perfectly correct to say, the donee "shall have power to sell" or to demise, or to "exchange" or "it shall be lawful for him "to sell" or "to exchange" or "to demise" for that which he is to do is *to sell* or *exchange*, or *demise*; the medium through which he is to do it, is the exercise of a power, because, having no interest in himself in the subject, he cannot affect *that subject* but by delegation from him who has an interest *therein*; but the thing to be effected, whatever may be the medium, is a *sale*, *exchange* or *demise*, and a sale or exchange, or demise, not of the person through the medium of whose direction or appointment it is produced, but of the person who delegated the power, whereby it is produced. When executed it stands as a limitation or limitations in the deed creating the power. It is the act of the creator of the power by the agency of the donee of the power. It is therefore just as much a sale or exchange, or demise, as if made by the person who delegates the power, or as a sale or exchange by a

be to take effect in future, may not be uncertain or conditional (otherwise than in respect of

person under a warrant of attorney, to sell or exchange, and execute conveyances for that purpose; the only difference is in the medium or operation by which it takes effect; the effect is produced by different modifications of delegated authority, but the thing effected is the same.

It is said in the note above-mentioned "that where the power of selling or exchanging is given in the terms, that it shall be lawful for the trustees, to grant, bargain, sell, release and confirm the lands, it is improper; for, in the strict sense of those words, it is impossible for the trustees to grant, bargain, sell, release or confirm, *because they have no actual estate, except their estate for preserving Contingent Remainders, and therefore cannot convey the lands for a larger term.*" But it seems to me perfectly immaterial, in what form of language the power is conceived. Whether it be enabling the donees to revoke the old uses, and appoint new uses, or enabling them to grant, bargain, sell, release and confirm, or in any other terms. Whether the power be vested in the trustees, or in third persons, they (the donees of the power) want no estate to transfer, previous to the instant of exercising their power; and on the instant of executing their power, a seisin or estate will arise in the donees of the power, if they are the trustees of the legal estate; if they are

of the possibility of its expiration before the former vests or fails) but may be so limited

as

are not, then in the trustees of the legal estate under the deed creating the power, sufficient for the purposes of the power, under the circumstances of the power, by that magical transmutation of possession, which the statute of uses produces, and which is adequate to every purpose, required to carry the power into effect. So that where the creator of the power says "it shall be lawful for the donee of the power, (be that donee the trustee of the legal estate which is to feed the uses, necessary to effectuate the power, or barely the donee of the power) to grant, bargain, sell, release, and confirm; and such donee executes an instrument, whereby *he* transfers the *subject* by *those words* with such formalities as are required to attend such execution, the statute of uses draws into the trustees, such an estate, as is adequate to transfer a possession to such uses, as *such* grant, bargain and sale, release, and confirmation requires, and the appointee is in as grantee, bargainee and releasee of the *creator* of the power, and all the covenants and warranties which run with the land are transferred to the appointee, just as they would have been had the creator of the power, *himself*, conveyed the estate by those forms of conveyance. So if the power is to exchange, the statute, on the exercise of the power, effects an exchange with all its concomitant incidents, by means of the agency of the donee of the

as to take effect, either in default of the preceding limitation taking effect at all, or by way

power, who, whether he be a donee of the power only, or both donee of the power and trustee of the legal estate, acts instrumentally only, so far as he confines himself to the power, and merely names the appointee, and ascertains the uses necessary to effect the purpose, and the statute supplies all the machinery.

It is admitted in the note to which I have alluded "that estates created by powers and estates created by conveyances, are after their creation the same." I am not aware, what is the meaning of this proposition, if it be not, that whether a sale, an exchange, or a lease be produced by a power, or by a conveyance by the limitation of uses, it is a sale, an exchange, or a lease, with all the incidents appertaining to those modes of enjoying *property*; if it mean merely that estates, however created, are portions of time in property, which is the only sense I can annex to the proposition, if it be not that before mentioned, it seems merely a circuitous mode of expressing a self-evident proposition, namely, *that an estate is an estate*. But if the former be the true meaning of the proposition, surely there can be no confusion in denominating a power, the exercise of which produces a sale, or an exchange, or a bargain and sale, or a release, or a confirmation, or a lease,

way of remainder after it, if that should take effect. In either of those cases, we see, it must

lease, a power of selling, or a power of exchanging, or leasing, &c. and the interest, or estate effected by the exercise of such power, is a sale, an exchange, a lease or the like; what confusion can arise from creating the power in the appropriate term by which the thing to be effected thereby is known; that is, by the words "that it shall be lawful for the donee," i. e. that the donee shall have power, to grant, to bargain and sell, to release, to confirm, to exchange, or to lease, &c.

Perhaps I may be said to be playing with words myself, unless I can suggest some solid reason, why I am so strong an advocate for retaining the language, in creating these kind of powers "to be found as (Mr. Butler observes) in the best drawn settlements" and I believe I might say, in all well drawn settlements, from the periods at which such settlements were first in use to the present day. I think the circumstance, that the exercise of the power, does much more than merely effectuate the appointment of a use in lands, is in itself a solid reason, for pursuing the practical form now used. It places the appointee in relation to the creator of the power, in all respects, in the *same situation*, as if the creator of the power had himself done in regular form, the thing the power authorizes, and the appointee is

must vest at the time appointed for the preceding limitation to vest ; for should the preceding

that character : He is the vendee, the exchangee, the bargainee, the releassee or the *lessee*.

Upon what ground is it, that the appointee under an exchange, is entitled to the implied warranty incident to an exchange, but that the transaction is an "exchange." Upon what ground is the lessee under such a power intitled to the advantages derived to lessees, under the statutes in their favour, and the creator of the power, or his heirs intitled to the remedies given to lessors, by those statutes for recovery of their rents, &c. but that the former are lessees, and the latter lessors, and the estate a lease. And might it not be contended, that if the donee of the power cannot exchange or cannot lease, that the appointee is not in by exchange, or is not a lessee. Perhaps in these times, such an argument might not meet with much attention, but why expose parties to the possibility of such an argument against them, when by pursuing the common form used by the best conveyancers, even a momentary doubt is avoided. Upon the whole it seems to me the possibility of raising a doubt is a solid reason for avoiding the adoption of *unusual* language in such cases, and that therefore the alteration suggested in the practical forms, used in creating such powers, rather tending to produce than to avoid confusion, had better be omitted than adopted.

ing limitation fail of taking effect, the subsequent one will then *vest in possession*; should the preceding take effect, the subsequent one will at the same instant, *vest in interest* as a remainder upon the preceding one, and then become liable to the same modes of destruction as other remainders of the same kind are subject to.— Thus, where there was a devise to two trustees and their heirs to receive the rents until *B.* should attain 21; and if *B.* should attain 21 or have issue, then to *B.* and the heirs of his body, but if *B.* should happen to die before 21 *and* without issue, remainder over; *B.* attained his age of 21, and afterwards died without issue: Lord *Hardwicke*, considering the word *and* as used for *or*, and the condition as disjunctive instead of copulative, decreed that the remainder over should take effect, upon the apparent intent of the testator, that it should take place, either in default of *B.*'s attaining 21, or on his dying without issue.

(397)

2 Vez. 243.
Brownfword
v. Edwards.
Vide supra
167.

and vide
Haywood v.
Stillington,
infra.

And where *feme covert*, pursuant to a power, left her husband the profits of certain estates for life, and after his death her estates to her children, if she should *leave any to survive her*, but in case she should leave no such child or children, nor the issue of such child and chil-

Southby v.
Stonehouse,
2 Vez. 610.

(398)

dren, and after the decease of her husband, she gave the estates to J. K. making him her sole heir in *default of issue left by her*. Lord *Hardwicke* held, that the children took estates-tail, and not in fee, and that the devise to J. K. was a *vested remainder*, and not a limitation to take effect only on the event, of the testatrix's dying without *leaving* any child or the issue of any *living* at her decease. He said the testatrix had only expressed the double contingency, which there is in the case of every limitation in remainder after an estate tail, *viz.* there being no issue at all, or all such issue dying without issue.

Collinson v.
Wright,
1 Sid. 148.

1 Fq. Abr.
188. pl. 8.

We must be careful however to distinguish cases of this nature, from a case where a testator devised to B. his son and heir, and if he died before twenty-one, *and* without issue of his body *then living*, the remainder over, &c. B. survived the twenty-one years, and it was held that he had a fee-simple immediately, and that the estate-tail was to arise upon a contingency which never happened, as he attained twenty-one: and likewise from a case, where the testator devised land to his wife till his son came to his age of twenty-one years, and then that his son should have the lands to him *and his heirs*, and if he died without

without issue *before* his said age, then to his daughter and her heirs; it was held to be an executory devise to the daughter, if the contingency happened; and that in the mean time the fee descended to the son, and if he attained twenty-one, though he afterwards died without issue, or if he should leave issue, though he died before twenty-one, yet the daughter was not to have the lands; because he was to die without issue, *and* before twenty-one to intitle her.

And vide
Barker v.
Suretees.
Stra. 1175.
(399)

For in these two last cases we observe the devise to the son was in fee, so as not to admit a regular remainder after it; whereas in that of *Brownsword v. Edwards*, the first devise was in tail; upon which circumstance Lord *Hardwicke* laid so much stress, as to say, that had the first devise been to *B.* and his heirs, the construction he gave could not, he believed, be made; for where there was such a contingent limitation, he did not know that the court had changed the word *heirs* into *heirs of the body*, to make it so throughout; and it may be remarked, that this distinction seems founded upon a principle nearly allied to the grounds of that distinction which I have stated above, between the cases of *Pells* vers. *Brown* and *Spalding* v. *Spalding*.

Supra, p. 307.

Vide supra,
p. 163.

(400)

I have already observed, that where a devise is made upon a condition annexed to a preceding estate, that is, where it is made after a preceding executory or contingent limitation or is limited to take effect on a condition annexed to any preceding estate; if that preceding limitation or contingent estate never should arise or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitation.

Scatterwood
v. Edge,
Supra, p. 163.

This I have instanced in the case of a devise to trustees for eleven years, remainder to the sons of *B.* successively in tail, provided they should take the testator's surname, and if not, or they should die without issue, remainder to the first son of *C.*; and though the devise to the sons of *B.* failed, yet the remainder to the son of *C.* took effect, and the limitation to the sons of *B.* was not held to be a condition precedent to its taking effect.

1 Eq. Abr.
245. Jones
v. West-
combe.

So where *A.* possessed of a term for years, devised it to his wife for life, and after her death to the child she was then *enfeint* with, and if such child should die before the age of twenty-

twenty-one, then one third part of the said term to his said wife, and the other two thirds to certain other persons; one question was, whether this devise to the wife was good, as the event happened; because the wife was not *enseint*, and so the contingency upon which the devise was made to her, viz. the child's death under twenty-one years of age never happened. Lord *Harcourt* held that it was good.

* However where lands were devised to *A.* in fee, upon condition he should pay the testator's debts, &c. if he did not, then to *B.*, *A.* died in testator's life-time, and it was held that *B.* took nothing.

(401)

Roe v.
Fludd, For-
tescue's Rep.
184.

But the authority of the last case has been repeatedly over-ruled, by several subsequent determinations. Thus in the case of *Hopkins v. Hopkins*, where the first devisee died in the life-time of the devisor; the Contingent Remainders over, as they were not vested at the devisor's death and the preceding freehold

Hopkins v.
Hopkins,
Cas. Temp.
Talb. 44.
Vide supra,
p. 231.

* The case of *Grascott v. Warren*, shortly stated here in the 3d edition, is expunged in Mr. *Fearne's* copy. Vide the case *infra* 411. in notes.

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failed,

failed, were held to enure by way of executory devise.

Andrews v.
Fulham,
cited 1 Vez.
421.

1 Willf. 107.

3 Burr. 1624.

(402)

And again, in a case in B. R. where the above mentioned limitation in the case of *Jones v. Westcombe* was brought into question again. *Lee C. J.* delivered the opinion of the court, "That the limitation over was good, "that the devise to the infant being ineffectual, was out of the case, and the law the "same whether the devise immediately pre- "ceding the limitation over was originally "void, or became so by non-existence or non- "entity of the person; for that since the law "allows such limitation over, it allows the "waiting for it; that it was one of those exe- "cutory limitations which depend on some "contingency, on the failure of a preceding "limitation; none of which take in all the "ways of failing, but still it was the same "thing.

Roe v. Wic-
kett, cited

1 Vez. 421.

1 Willf. 107.

3 Burr. 1624.

This resolution was upon the leasehold part of the estates which passed by the will. But afterwards the same point, in regard to the freehold lands, came into question before the C. B. which court was of opinion, that the event of no child's being born was a *casus omissus*, concerning which no direction was given

given by the will; that the rule was, that an heir at law is not to be disinherited but by express words or necessary implication; so that upon that ground the devise over could not take effect: that *Andrews v. Fulbam* being a determination on the leasehold, was distinguishable; that the plaintiff there had assented to the devise over, and so was concluded: and that there was a difference of construction between the leasehold and freehold, because of the favour shewn to an heir at law.

Upon this another ejectment was brought in B. R., when *Lee Ch. J.* delivered the opinion of the court, that the devise over was to be considered as a limitation subsequent; the first as a preceding limitation (not a condition) which, whatever way it was laid out of the case, the other took effect.—That the true construction of the will was that there was a good devise to the wife for life, with contingent remainder to the child in fee, with a devise over, which they held a good executory devise, as it was to commence within twenty-one years after a life in being; and if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife; and the number of contingencies

Gulliver v. Wickett,
1 Will. 105,

(403)

tingencies were not material, if they were all to happen within a life in being, or a reasonable time afterwards.

Fonereau v.
Fonereau,
3 Atk. 315.

Again, in another case, where the testator gave a sum of money to trustees, to pay the yearly interest and produce thereof to his children after their ages of twenty-one, equally between them, and after their respective deceases, to divide the share of each child among the issue of such child, as the parent should appoint, and for want of appointment amongst such issue equally at their respective ages of twenty-one years, and in case any such issue should die under that age, the share of the issue so dying to go to the survivors, and *in case* all the issue of any of the testator's children should die *under twenty-one*, to be divided *equally among all the testator's other children*:

(404)

P. one of the testator's children died, after attaining the age of twenty-one, *without having had any issue*. And the question was, whether his share was absolutely vested in him, and if not, then as the testator had made no provision for the share of any child who should *have no issue*, it was contended it should fall into the *residuum* of his personal estate: for that the only case in which any child's share was given over to the surviving children, was
upon

upon the contingency of all the issue of such child dying under twenty-one, which here had not happened, because *P.* never had issue.

Lord *Hardwicke* was clear that it never vested in *P.* himself, for nothing was given to the children themselves but the share of the yearly produce or interest of the principal sum. But he was of opinion that it went according to the devise over; and though a distinction was taken between that and the case of *Jones v. Westcombe*, upon the ground of its being a disposition merely of personal things, and therefore not to be considered as disposed of by way of remainder, but as to take effect strictly according to the contingency upon which they are limited; yet his Lordship said the case of *Jones v. Westcombe*, was an authority directly contrary, according to Lord *Harcourt's* opinion, and that he was of Lord *Harcourt's* opinion upon the reason of the thing; that there could be no reason for a devise over in case of the issue of a child dying, and not in the case of a child itself dying without any issue at all.

(405)

He thought there appeared an intent that it should go over absolutely; that the introductory words of the residuary clause were,
after

after payment of all debts and legacies, &c. he gave the residue; that this was a particular legacy divided from what he intended to be the residue; and his Lordship was of opinion, the share of *P.* ought to go among the surviving children.

1 Vezey 420.

So in the case of *Avelyn v. Ward*, where *A.* devised his real estate to his brother *B.* and his heirs, on condition that *B.* should give a release within three months after the testator's death; but if *B.* should neglect to give such release, he devised it to *R.*; the first devisee died in the life-time of the testator, and it was decreed that the devise over should take place; and though a distinction was contended for, between the case of a remainder over after an executory particular estate only, and those cases wherein an executory devise was introduced after a disposition of the whole fee, yet Lord Hardwicke exploded that distinction, as he did not find (he said) any authority to warrant it; and he thought the case of *Jones v. Westcombe*, above cited, a strong authority, that the construction ought to be the same, whether it be the case of a remainder limited conditionally after a particular estate, which never takes effect, or whether it be a contingent limitation after a fee: for
in

And vide
Hayward v.
Stillington
infra.

(406)

in that case it was so in respect to the freehold, notwithstanding the devise for life which was precedent to the limitation in fee to the child; for as that fee to the child stood before the limitation over, the preceding estate for life did not alter the case as to that point (a).

It

(a) So where one devised copyhold lands in manner following "as to my copyhold, which I have or intend to surrender to the use of my will, I give, &c. and the remaining third I give to the child with which my wife is now enseint, and to the heirs of such child or children for ever; and if such child or children should not be born alive, or being born alive should die, without leaving lawful issue, or before he or she has disposed of the same, I give it to my wife." The wife was not with child. Lord *Hardwicke* Chancellor was of opinion it was well devised and passed by the will, and that it ought to be construed, as if he had said *and if no child be born alive.* *Taylor v. Taylor*, 1 *Atk.* 386.

Again in the case of *Statham v. Bell*, where S. made his will, in which, among other things, he said "Whereas my wife is now pregnant, if she bring forth a son, I will that he shall inherit my estate at twenty-one years old, paying 4*l.* a year to my wife, and 30*l.* a year to my daughter, at her coming

4 Mod. 259.

It has been said indeed, that in cases of executory devises there can be no limitations over;

coming to the age of twenty-one years, and 10l. more to her on the death of my wife : but if it be a daughter, I give one moiety to my wife, and the other to my two daughters, to be divided between them at the age of twenty-one years, if either die before that time, the survivor to have her sister's share ; if both die before that time, I give both their shares to my wife and her heirs for ever. If she die, then I give her share to my two daughters." The testator died leaving his widow and an only child, a daughter ; the testator's wife was not enfeint at the time of making the will, nor at the time of the testator's death, the daughter died under age, and without issue. The question stated, on a case out of Chancery for the opinion of the court of King's Bench, was, whether the wife took any, and what estate under this will, no child being born. The counsel against the wife considered the simple question to be, whether it was intended by the testator, that in the event which had happened, the wife should take the whole estate. He insisted she should not, but upon the precedent condition expressed in the will, *viz.* the birth of a second daughter, and the death of both without issue, which condition was not performed, and therefore she could not be entitled. For if a son had been born, he was to take the whole estate, subject to the incumbrances charged upon it. If a daughter,
one

over; by which, it is presumed, was meant, that where the whole interest is once given

one moiety only was to go to the wife, and the other moiety to the two daughters; and if both daughters died without issue, then the wife was to have the whole; therefore he did not intend that in *all* events the estate should go to his wife, but only upon a particular contingency, which contingency had not happened. But the court of King's Bench were unanimously of opinion "that it was the plain intention of the testator, that in case no son should be born, and he should have no daughters, who should live to the age of twenty-one years, that the wife should have the whole estate; in the event which had happened she was so entitled." And Lord *Mansfield*, who delivered the opinion of the Court, added, that the facts of this case differed from the famous case of *Jones v. Westcombe*, for here it was clear, that if the testator had died during the pregnancy, the estate would have descended to the heir at law in the mean time. *Cowp.* 40. *Dougl.* 65.

And a similar determination was made in the case of *Gordon v. Adolphus*, stated *supra* 227. in the *note*.

In that case it was contended, on one side, that the disposition made by the testator of his effects, after the life estate to his wife, was confined to the

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event

given or included in any executory devise, it cannot be again limited over on another

event of her entering into a second marriage; then and in that case *only*, it was, that the residuary bequest to the daughter took place under the will.

On the other side it was insisted that the testator meant to dispose of his whole estate, and not to die intestate as to any part of it. He had given it to his wife during her life or widowhood; after her death or second marriage, he devised it to his daughter absolutely, in case she should have issue; but if she should *leave* no issue, then it was given over.

And the event of the appeal was agreeable to the latter arguments, for the decree appealed from was confirmed.

Again in *Bradford* vers. *Foley*, Dougl. 63. which was a case sent from the Court of Chancery for the opinion of the judges of the court of King's Bench, stating that *A.* made his will, and thereby gave and devised all and singular, his real estates whatsoever, and wheresoever to trustees, and their heirs in trust to preserve Contingent Remainders, then to the use of his son *B.* for life, remainder to the first and every other son, which he should have by any *future* wife, with whom he should afterwards intermarry, in tail male, and for default of such issue male to the

another contingency; for where the whole interest was not limited in the first executory

the use of the daughters of such marriage, as tenants in common in fee-simple "provided always and it
"is my full and express intent and meaning, that if
"my said son shall hereafter marry, with any wo-
"man, who is any ways related in blood to *M. A.*
"his now wife, that all and every the above limited
"uses, as far as the same shall relate to the issue of
"such future marriage, shall utterly cease, determine,
"and be void, to all intents and purposes, it being
"my steadfast resolution, as far as the law enables
"me to hinder, that no person any ways a-kin to
"her blood, or born or descended from any such
"person, shall inherit any part of my estate, and,
"in such case, notwithstanding there shall be lawful
"issue of my said son by such future marriage, liv-
"ing at the time of his decease, my will and mind
"is, that they nor either of them shall take any thing
"by and under this my will, but that the said trus-
"tees shall stand seised of all and singular the said
"premises, to the use of all and every the child and
"children of my late brother *E.* deceased, which
"shall be living at the time of my decease, to have
"and to hold the same, if more than one child, to
"them and their heirs, share and share alike, as
"tenants in common, and not as jointenants;" the
daughters' shares to be to their separate use "and
"in case all and every of the said children of my said
"brother should happen to die in my life-time, or

executory devise, it should seem, there could be no question as to the validity of

“after my death, without issue, then I hereby give
 “and devise *all* and singular my said real estate to
 “my right heirs; I mean such heirs only as shall
 “be no ways related in blood, or claim any descent
 “from any person related in blood to the same
 “*M. A.* my son’s now wife; all and every of whom
 “I utterly exclude from any right, title or benefit
 “from my real and personal estate, in any shape
 “whatsoever.” The testator died. There were
 five children of *E.* his brother, living at the time
 of his death. *B.* the testator’s son died without
 issue, and without marrying again, leaving *T. F. H.*
 his heir at law, but having made his will, disposing
 of “what might become due to him in expectancy
 or reversion” as therein mentioned. And the ques-
 tion for the opinion of the Court was, “Whether
 the children of *E.* the brother of the testator, had
 taken any, and what estate, in the case that had
 happened. It was contended on the one side
 that the children of the testator’s brother had taken
 an estate tail with cross remainders, although the
 previous event on which the devise to them was
 limited, had never happened; for 1st, These words
 were not to be construed as constituting a condition
 precedent, but as words of limitation. 2^{dly}, That
 the intention of the testator was certainly to exclude
 the children, that his son might have by his then
 wife, and yet, according to the argument which
 would

of a further limitation, because there still remained some interest undisposed of,

would be made use of for the heir at law of the son, such children, if there had been any, must have taken in the event that had happened. On the other side it was insisted, that this was a condition precedent; that in every view the old reversion here must have remained, and that as to intention, it did not appear that the testator had taken into consideration, the event of his son's having children by his then wife, and not marrying again. *Et per Lord Mansfield*, nothing can be clearer than that the testator meant no child of *M. A.* should take in any event, and yet if this was a condition precedent, such child, if there had been one, must have taken.

The Court took time to consider of their certificate, and then certified "that they were of opinion, that the children of *E.* took estates tail, with cross remainders."

So in the case of *Jefferys et Ux. v. Reynolds et Ux.* 6 Bro. Ca. Parl. 260. where *A.* among other bequests "gave, devised and bequeathed unto trustees, their heirs, executors and administrators, respectively, all such stock, funds, mortgages, &c. and all his estate therein, upon trust, that they should pay and apply the interest, &c. unto and to the use of his wife, for and during such and so long time only as she should continue his widow, and be

of, and consequently something more to limit.

It

and remain sole and unmarried, but in case his wife should after his decease intermarry with any after taken husband, then his express will and meaning was, *and then and in such case* he did direct his said trustees, to pay to his said wife the yearly sum of 110 l. and no more, by and out of the interest, &c. of his personal estate, over and above the provision made for her by marriage articles, such payment to be made as therein mentioned, and *then and in such case* he willed and directed his said trustees to pay, apply and dispose of the residue and overplus of the interest, &c. of all his stock, funds, &c. for and towards the maintenance and education of his son C. and of all other his child and children by his said wife. And his will was, *that then and in such case* all his stock, &c. over and above what should be sufficient to answer and pay to his said wife the said clear yearly sum of 110 l. during her life, should be received by his trustees in trust, for the use and benefit of his said son C. and of all such child and children as aforesaid, equally between them, share and share alike, if more than one, to be paid, assigned and transferred to him, her and them, &c. and that from and after the death of his said wife, such sums of money and securities as should be reserved to answer and pay her annuity should go in like manner; *and in case* it should so happen that
his

It is true, it formerly was held, that where-
ever the first executory limitation was in such
words

his said son C. should depart this life before twenty-one, and without leaving issue, and that *he* should have no other child by his said wife, or there being such, all of them should die in the life-time of their mother, and before twenty-one, *then and in such case* his will was, and he did thereby authorize and empower his said wife to give, dispose, limit and appoint part of his said personal estate as she in her discretion should think proper, and then also he gave, devised and bequeathed the rest and residue of his stock, &c." unto and amongst certain persons therein named and described as therein mentioned.

A. died leaving his wife B. and C. his only son, him surviving. Afterwards C. intermarried and died without issue, having first made his will, and given some pecuniary legacies, and a moiety of the rest and residue of his estate and effects to his wife, and the other moiety to his children, if any, if none then to his wife.

And on a bill in Chancery filed by C.'s wife, among other purposes, praying an account, and that the residue of her husband's personal estate might be paid, assigned, and delivered over to her: One question was, whether she was intitled to A.'s personal estate?

D d 4

And

words as would convey the whole interest, there any subsequent limitation was void, notwithstanding

And it was insisted, that *A.* had not, by his will, disposed of the residue of his personal estate, save only in the event of his wife's marrying a second husband.

And on a second hearing before the Master of the Rolls, his Honor on this point of the case declared, that on the true construction of *A.*'s will, the clear surplus of his personal estate, not specifically bequeathed, by the event which had happened, was undisposed of, subject to the life estate therein to his widow.

From this part of the decree an appeal was made to the Chancellor, and the same was reversed, and an appeal from that reversal, carried to the House of Lords.

And it was observed on behalf of the appellants in the House of Lords, that the testator *A.* had not given the trust of his personal estate to his wife, during her life, but during her widowhood only. If she married again, he directed his trustees to pay her, out of the produce of his personal estate, the annual sum of 110 *l.* only ; and it was upon the contingency of his wife's second marriage, that he had grounded every subsequent disposition which he made ; for upon the most accurate examination of every

withstanding the preceding limitation never took effect; as where a term was limited to a man

every following clause, it was to be found, that the words *then and in such case*, or some restrictive and correcting words equivalent to them, confined the disposition therein made, to the event of such second marriage, which in fact never happened; and though such a disposition might seem extraordinary, it was not without precedent. And it was submitted, that the construction of the will must be made from the words of it, and the manner in which the testator had expressed his intention, without regard to the consequence of such construction. In the event, which had happened, the residue was undisposed of.

On the other side it was insisted that the testator *A.* had by his will, made a complete disposition of his fortune; as it appeared by the whole tenor of it, that he did not mean in any event to die intestate. If the supposed intestacy was to take place, upon the widow's not marrying again, the provision under his will, for his only child, would intirely depend on the conduct of the widow, and such child would be provided for, only in case the widow did that, which the testator wished her not to do: and if she continued a widow, in the pursuance of the intention and inclination of the testator, then, according to the construction contended for, by the appellants, the only child of the testator, was to lose

man for life, and afterwards to his first and other sons in tail successively and for default of

lose all the provision intended for him by the will. But the true intent and meaning of the testator, plainly appeared to be, that in all events, his child was to take the personal estate, after the death of the mother; but in case she married again the child was to be let into a considerable part of it even in her life-time.

And the decree for reversal of the judgment at the Rolls was affirmed.

But the construction of these cases proceeds merely upon the *apparent intent*, for though, where the *preceding* estate appears to be the *only* object of the condition, and the remainder appears *intended* to take effect, either *after* or *in lieu of it*, it will not be construed to affect the remainder; yet it is otherwise, wherever *such intent* cannot be *reasonably* presumed. This will appear, as well from the foregoing cases upon this subject, as from those which immediately follow, and are illustrative of both instances.

Thus in the case of *Sheffield* and *Lord Orrery*, stated *supra* vol. 1. 363. where *A.* devised his house, &c. to his wife for life, upon express condition that if she should marry again, then that the house, &c. should go forthwith to the eldest son, and his issue, &c.

of such issue, remainder over; this remainder was held void, though no son was ever born; because

Pollexf. 33.
Backhouse's
case.
Vide same
point.
1 Mod. 115.
Burgiss's
case.

§c. Lord *Hardwicke* held that it was not a vested remainder in the son, but a contingent limitation to take effect only, if the wife of the testator should marry again.

So in the case of *Grascot* vers. *Warren*, 12 *Mod. Rep.* 128. *Comb.* 437 2 *Eq. Ca. Abr.* 361. where a man possessed of a term, devised it to an infant *in ventre sa mere*, if it should be a son; and if it should be a son, and die during his minority, then he devised it to his grandson: after which he died, leaving his wife executrix, and the child was after born, and proved a daughter; it was adjudged, without argument, that the executrix, and not the grandson should have the term; because the grandson was not to have it, but upon a precedent contingency, *viz.* the birth of a son, and his death in his infancy, which condition must be first performed; and it appeared plainly, that the intent of the testator was that he should not have it otherwise.

Again in the case of *Calthorpe* v. *Gaugh*, at the Rolls, 18th *Feb.* 1789. stated 3 *Bro. Rep. Ch.* 395. Sir *H. G.* by will (*inter al.*) gave 10,000 *l.* to trustees to place out in the funds, to pay the interest and produce, during the joint lives of Sir *H. G.* and dame *B.* his wife, into the hands of dame *B.* for her separate use; and in case *she should die in the life-*
time

because the first limitation to the sons in tail was an executory devise of the whole interest:
fo

time of Sir H. G. her husband, in trust, to dispose of the said 10,000 l. in such manner as she, alone, without her said husband, notwithstanding her coverture, should by any writing, &c. direct or appoint, and for want of such appointment, to pay the same unto and amongst all the children of the said dame B. G. who should be then living, share and share alike; and if no such child or children should be then living, then that they should pay the same to such person as should be then in possession of the manor, &c. by virtue of the said will: but if the said dame B. G. should survive the said Sir H. G. then that the trustees, after the death of the said Sir H. G. should pay the said 10,000 l. to the said dame B. G. for her own use.

By a codicil he confirmed the will, and added new trustees to see and cause to be paid, in equal payments, a legacy to his sister, and "then directed," in case my sister's children do not live to their several ages of 21, the legacy left to her is to revert to my heir at law.

Lady G. survived her husband Sir H. G. and died in the testator's life-time, leaving the plaintiff Sir H. G. her eldest son, and heir at law, and the defendants T. G. and J. C. G. and E. and dame C. wife of Sir J. P. which said dame C. P. survived her mother,

so that wherever an executory devise would, if it had vested, have carried the whole interest,

ther, but died in the life-time of the testator. And the defendant Sir J. P. was her administrator.

And his Honor in giving judgment, said, this was an absolute legacy to Lady G. qualified on account of her situation as a married woman. If she died in the life-time of her husband, she had a power of disposing of it, and if she did not so dispose of it, it was to go to her children; if she survived her husband, she was to have it absolutely; there was no event in which the children could take any thing, which it was not in her power to deprive them of. The testator presumed, as every testator does, that the persons who were to take under his will, would survive him. If the testator had foreseen the event which had happened, he would probably have provided for it, but that consideration ought not to influence his judgment, for the same observation would apply to all cases of lapsed legacies. As to the codicil he could not see that it made any difference, Lady G. would have taken the legacy, just in the same manner under the codicil as if it had remained upon the will alone.

He therefore determined, that the 10,000*l.* was payable to the person in possession of the manor.

So

terest, no limitation over could be good, even though the preceding never vested.

But

So in the case of *Davis* vers. *Norton*, 2 P. Will. 390. *T. H.* seised in fee of lands, and having a wife *A.* and an only son *W. H.* and a sister *M. S.* devised the same to his son *W. H.* and the heirs of his body, and if his said son should die without issue of his body, and the said testator's wife *A.* should survive his the said testator's son, then the testator's wife *A.* should enjoy the premises for her life, and after her decease, then the premises should be enjoyed by the testator's sister *M. S.* for her life, and after her decease, (the testator's son *W. H.* being dead, without issue *as aforesaid*) then the testator devised the premises to the lessor of the plaintiff *J. P.* and to two others, (both since dead) and to their assigns for ever. The testator died and the wife *A.* did not survive the testator's son *W. H.* But the testator's son died without issue, upon which *M. S.* the sister and heir entered and enjoyed, during her life. Then *J. P.* the then surviving devisee over in fee, became plaintiff in ejectment. And the question was whether *J. P.* took any thing by this devise, in regard, *A. H.* the testator's widow died in the life-time of her son *W. H.* so the contingency of the son dying without issue in the life-time of the testator's wife, had not happened, and whether this contingency was annexed to all the subsequent estates and limitations, and prevented any one of them from taking effect.

It

But the doctrine in those cases has been long since denied ; and it seems now to be settled,

It was insisted, 1st, that the remainder to *A. H.* was a vested not a Contingent Remainder.

2dly, That if the remainder to *A. H.* was a Contingent Remainder, yet this contingency did not extend to the subsequent limitations, but the same were substantive devises, without any regard had to the contingency of the testator's son dying without issue in the life-time of the testator's wife ; that the principal case did not differ from the case of a devise to my son in tail, and for want of issue of my son, the remainder to my wife, or a devise to my son and the heirs of his body, and if he die without issue, then the remainder to my wife ; in which case the words " if " or " then " would be insignificant. And that in the limitation to the wife for her life, the words " in case she be living at the time of the son's dying without issue," must plainly be immaterial and insignificant ; for if the testator's wife, was not then living, she could not take, and it was the stronger as an estate for life was limited to the wife.

But Mr. Justice *Reynolds*, by whose opinion it was determined, by *consent* of counsel at the assizes, said,

That if the devise had been " to the testator's son, and the heirs of his body, and if the testator's
I son

settled, that whatever number of limitations there may be, after the first executory devise of

son should die without issue, and the testator's wife should survive him, then to the wife for her life," it might be reasonable to take it, to be a vested and a common remainder, to the testator's wife, upon the son dying without issue; but as it would have been plainly otherwise, if the devise had been "to the wife, in tail or in fee, in case the son should die without issue, and the testator's wife should be then living;" so in the present case, it is the same as if the devise upon this contingency, had been to the testator's wife in fee; because all those remainders are but as one estate arising upon the same contingency, and as from one root.

And he said this devise to *P.* and the two others in fee, on the testator's son dying without issue, cannot be taken as a substantive devise, because the devise is to *P.* and the two others in fee, *the testator's son being dead without issue as aforesaid*; which words (as aforesaid) imply the same as, in manner aforesaid, or as if these words had been repeated, viz. "in case my son dies without issue, my wife then living;" for which reason the contingency not happening, the devise to *P.* and the two others is void; and if this were but doubtful, yet by doubtful words an heir ought not to be disinherited.

And

of the whole interest, any one of them which is so limited, that it must take effect (if at all) within

And the judge delivered his opinion, that the remainder to *P.* was a Contingent Remainder, depending on the death of *W. H.* without issue, in the life of *A.* the testator's wife, and as that contingency never happened, the remainder, which depended thereon, could never arise *.

Again in the case of *Moorhouse* vers. *Wainhouse*,
 1 Sir *W. Blackstone's Rep.* 638. where *A.* and *B.* his wife by a deed to lead the uses of a fine, settled lands (being the wife's inheritance) to the use of *B.* for life, remainder to *A.* for life, if he and the said *B.* should have any issue, that should so long live, remainder to all such children in fee, as tenants in common: If *B.* should die without such issue, or all such issue should die before twenty-one, then as to one moiety to *A.* in fee, and as to the other moiety to *C.* mother of the said *B.* for life, and to the appointees of the said *C.* and her second husband, and in default of appointment to the said *C.* in fee. Proviso that *A.* and *C.* should pay 2*l.* 2*s.* to one *R.* and in default, the trustees to enter and raise the

* *N. B.* Lord *Thurlow* in the case of *Doo* vers. *Brabant*,
 3 *Bro. Rep. Ch.* 397. *et infra* 439. considered all the remainders in this case as vested, and that they should have taken place: and that the case was no authority for any one point; it was misconceived he said from beginning to end.

within twenty-one years after the period of a life then in being, may be good in event, if
no

same out of the rents and profits. *A.* afterwards died, living *B.* who intermarried with *S.* who also died; and by lease and release *B.* made a tenant to the præcipe for a recovery, which was suffered and the uses declared to herself in fee. She afterwards devised the same in fee. And on an ejectment brought by her devisee, against the heir at law of *A.* one question was how far the contingency affected *A.*'s interest. And the court were clearly of opinion, upon all the circumstances of the case, that the contingency, on which it was intended, that the estate of *A.* should arise, was, that of his surviving his wife; and, that as he died first, the contingency never arose.

But in the case of *White* and others against *Barber* and others, 5 *Burr.* 2703. which was a case out of Chancery, the condition was construed liberally, in favor of children, *on the intent*, from whom, had it been expounded according to the letter, the testator's fortune would have been carried, in favor of his nephews.

In this case the testator devised to *E.* his wife, several freehold and copyhold estates therein mentioned, to hold unto her, until his son *T. P.* should attain the age of twenty-one years, she to maintain his children, then he devised the same to his son in fee.

no one of the preceding executory limitations, which would carry the whole interest, happens
to

fee. But if it should happen that his wife should be enseint with one or more children, at the time of his decease, and his said son *T. P.* should die without issue, before he attained the age of twenty-one years, such child or children being then living; he then devised the said premises to his said wife, till such child or children should attain his, her or their ages of twenty-one years; she to maintain his children; and then he devised the same to such child or children in fee. But if it happened that his said son *T. P.* should die without leaving issue of his body, and before he attained his age of 21 years, or that his said wife should at his the said testator's decease, be enseint with one or more child or children, who should die without leaving issue of his, her, or their body or bodies, before he, she, or they attained their age or ages of twenty-one years, then he devised the said premises to his said wife for the term of her natural life; and from and after her decease, then as to part of the said copyhold premises, he devised the same to his nephew, the defendant, *E. P. C.* in fee, and the other part of his said copyhold premises, he devised to his nephew *T. B.* in fee: but if he should die without lawful issue of his body, then he devised the said premises to the right heirs of *J. C.* and *M.* his wife (both deceased) in fee, and as to the residue of the said freehold and copyhold premises, he devised the same to his ne-

to vest. But when once any preceding executory limitation, which carries the whole interest,

phew the defendant *W. C.*, to his godson the defendant *E. P.* and to his nephew the defendant *T. C.* in certain proportions in fee. The testator then gave several legacies. And gave all the residue and remainder of his goods, chattels, and personal estate whatsoever, and wheresoever, after the payment of his debts, &c. to trustees in trust, for the sole use and benefit of his son *T. P.* to be paid to him at his age of twenty-one years; and thereby appointed the said trustees, executors of his said will, for the uses and purposes aforesaid. But if it should happen that his said wife, should at the time of his decease, be enseint with one or more child or children, then and in such case, he bequeathed all the said residue and remainder of his personal estate, subject and chargeable as aforesaid, to his said executors, in trust for such child or children of his said wife, as his said wife should happen to be enseint with at his death; to be paid to such child, when he or she should attain his or her age of twenty-one years; and if more than one child, then to be equally divided amongst them share and share alike, to be paid to them at their respective ages of twenty-one. And in that case, the said testator appointed the said trustees, executors and trustees of his will for the purposes aforesaid; but if it should happen that his said wife should not be enseint with one or more child or children, at the time of his

terest, happens to take place, that instant, all the subsequent limitations become void, and the whole interest is then become vested.

Thus

his decease, or that his son *T. P.* should die before he attained his age of twenty-one years, without issue of his body, or that his wife should at his decease be enseint with one or more child or children, and such child or children should happen to die, before he she or they should attain their respective ages of twenty-one, without issue of his, her, or their respective body or bodies, then and in every of the said cases, he thereby gave and bequeathed to his nephew *T. B.*, all the said residue of his said personal estate, he paying all his debts, &c. with which he had charged his said personal estate; and in such case, the said testator appointed the said *T. B.* sole executor of his said will.

The testator at the time of making his said will had only one child, the said *T. P.* but after the making thereof, and before his death, he had two other sons born, viz. the plaintiffs *E. P.* and *J. P.*

Afterwards the testator died without altering his will, leaving issue the said three children, the said *T. P.* who died without issue under 21, and the said *E. P.* and *J. P.* infants of tender years, who were born after making his will, in the testator's life-

Maffenburgh
v. Ath, 1
Vern. 304.

Thus where a term of years was settled, upon marriage, in trust for the husband and wife,

time, and who were still living, not provided for, unless they took by this will.

The testator's wife was then living, but not enfeint at his death.

And the question was whether, in the event that had happened, any and what estate was vested in E. the wife, and the defendants, the devisees, or any of them; and if no estate was vested in them or any of them, then whether any and what estate, was vested in the plaintiffs E. P. and J. P. the two infant children or either of them.

One ground of argument, on behalf of the sons was, that the words "if his wife should be enfeint at the time of his decease," should be taken as a *condition precedent*, rather than his son and heir, should be disinherited. And this case was compared to the case of *Grascot and Warren, supra*.

On the other side it was insisted, that it was not enough to say, that the testator did not intend to exclude the infant plaintiffs; it was plain that he did not intend to include them. He did not foresee that he should have these two after-born children, in his life-time; and not foreseeing such an event, he did not mean to provide for it; he had it in his power

wife, for their lives and the life of the longer liver of them, then in trust for the maintenance

power to alter his will, upon the change of circumstances; but he did not do so. The limitation "to his nephews" was therefore still subsisting. It never was a void one, though it might be now become a hard one. However the will must be taken as it stood; no body's wishes could alter it. The testator had not thought fit to alter it, and it was not in the power of the court to make a will for him. As to the wife's "being enseint at the time of the testator's death" being a condition precedent, the case of *Jones and Westcombe*, shewed that it was not.

The judges certified that they were of opinion that the provision by the testator being for children, which were to be born after the making of his will, he certainly *intended* to comprehend *all* the children, which should be born of his then wife, (whether *before* or *after* his decease) for, they thought that a father in making an express provision, for any children, which his wife should be *enseint with*, at the time of his *decease*, could never intend to give his estate to *such children in exclusion of*, or to his nephews (as the event had happened,) in *preference to* any child or children, that might be born in his life-time.

nance of the eldest son until his age of twenty-one years, and then to be assigned to him for the

They were therefore of opinion, that notwithstanding the defect of expression, in this will, the children *born before* the testator's death, were *certainly included* in the provision so anxiously made by a parent for his posthumous children; and that upon the true construction of this will, the plaintiffs *E. P.* and *J. P.* would be entitled, (from the testator's *manifest intent*) to take an estate in fee, in the premises, at their respective ages of twenty-one; and that in the mean time *E.* their mother, was intitled to hold the said premises, subject to the trust of the said will for their education and maintenance.

In the case of *Doe v. Shippard*, a condition was literally construed, there being no ground *furnished* by the case, to shew the *intent* otherwise, than as expressed in the letter. This case arose on a special verdict in ejectment, the facts were, *A.* devised as follows: *viz.* All his messuages, tenements, lands, and hereditaments in *Essex*, to trustees and their heirs (one of whom named *B.* was the defendant) upon trust and confidence, that they should, out of the rents and profits thereof, levy and raise the sum of 20*l.* and pay the same quarterly to *C.* his daughter, then wife of *D.*, annually, during her life, to her separate use; and upon farther trust, that they

the remainder of the term, and in case he should die under that age, then in trust in the like

they should pay and dispose of all the residue of the rents and profits, as also of the whole rents and profits thereof, after the decease of his said daughter, to the use of the said *D.* for the term of his natural life. “And in case my said daughter *C.* should happen to survive the said *D.* her husband,” then upon trust and confidence, that they the said trustees shall stand and be seised, of all and every my said messuages, lands, tenements, and hereditaments, to the several uses, intents, purposes, and upon the several trusts, herein after mentioned, *viz.* to the use and behoof of my said daughter *C.* for and during her natural life; and from and after the decease of my said daughter, then to the use of my grandson *H. D.* son of the said *D.* and *C.* and the heirs of his body, and, for default of such issue, then, to the use and behoof of the heirs of the body of the said *D.* and *C.* and in default of such issue, then to the use of the heirs of the body of *C.* by any other husband, and in default of such issue, then to the use and behoof of the said *D.* and his heirs for ever. *Item* I do give, &c. all my messuages, &c. in, &c. to the same trustees, to the use and behoof of the said *D.* and *C.* his wife, and the survivor of them, until such time as the said *H. D.* my grandson attain the age of twenty-five, and from and after the decease of the said *D.* and *C.* his wife and

like manner for the second and other sons of that marriage, in like manner one after another

the survivor of them, and after my said grandson attains his age of twenty-five years, which shall first happen, then to the use and behoof of the said *H. D.* my grandson and the heirs of his body, and for default of such issue, or his dying under the said age, then to the use of the heirs of the bodies of the said *D.* and *C.* and in default of such issue then to the use of the heirs of the body of the said *C.* by any other husband, and, in default of such issue, then to the use and behoof of the said *D.* his heirs and assigns for ever. On the testator's death *D.* entered and held the premises, till the time of his death. *C.* died in the life-time of her husband, and there was no other issue of them than *H. D.* who enjoyed the same, till his death: he died without issue. *B.* the defendant and surviving trustee was the eldest brother and heir of *D.* and also the eldest uncle and heir, on the part of the father of *H. D.*—*J. W.* and *M.* the wife of *J. P.* two of the lessors of the plaintiff, were nephew and niece and heirs at law of the testator, on the part of the mother of *H. D.*

The question was, whether the limitations over were to take effect in the event which had happened of *D.* the husband having survived his wife, the testator's daughter.

another till one of them should attain the age of twenty-one years, and in case there should be

Et per Lord Mansfield there are no express words limiting the estate over on the event which has happened of *D.* the husband having survived his wife, the testator's daughter. Now there were no express words limiting the estate over, in that event, and yet it was plain, that it was foreseen by the testator, for he gave the rents and profits to the husband after the death of the wife. The testator then proceeded to say, and in case my said daughter *C.* shall happen to survive the said *D.* her husband, then upon trust, &c. The court might supply the omission of express words, if they find a *plain intent*, but unless that was the case, they could not do it; and upon full consideration of the whole of this will, they did not find there was sufficient for them to gather such intent, so as to warrant them in supplying the omitted words. Guesses might be formed, but that was not enough. Perhaps *quod voluit, non dixit*. They could not make a will for the testator. This case bore no resemblance to the famous case of *Jones* vers. *Westcombe*, for there the intention was clear, that, "failing the child, the estate should go over to the devisees, in all events." *Doughl.* 75.

In the case of *Rudsdell* vers. *Rudsdell*, 5 Burr. 2806. which was also a case out of Chancery, the heir

be no such issue, or all should die under twenty-one years of age, then to *J. M.*; husband
band

heir at law was let in, on the ground, that, as *events turned out, on the general intent*, the contingency first mentioned, was to precede the vesting of all the limitations, in the subsequent part of the will.

In this case, *I. D.* soon after his marriage, made a settlement, whereby, for making some provision after his death for his wife, and the younger sons and daughters he might have by her, he granted to *B. C.* an annuity of 50 *l.* issuing out of lands, to hold to him his heirs and assigns, to the use of his wife for life, and after her decease, to the use of all and every of his children, on the body of his said wife begotten, (other than an eldest or only son) as tenants in common, and their heirs severally for ever, and for default of such children, to the use of his right heirs for ever. And a proviso was inserted in his settlement, that if at any time, after the decease of him, and his wife, his eldest or only son by his wife, or his heirs or assigns, should be willing to pay to all, or any other of his children by her, or the heirs of them, or any of them, being of the age of twenty-one years or upwards, for and in satisfaction of the said annuity, or yearly rent-charge, or his or their part or parts thereof respectively, so much money as the same should amount unto, at the rate of twenty-five years purchase, then such monies

band and wife died, leaving a son who died an infant. Upon a case stated for the opinion of
of

monies should and might be paid, and should be taken and accepted accordingly; and from and after such payment thereof, the said annuity or yearly rent-charge, or so much thereof, as should be so bought off or paid for, should cease and determine.

Afterwards the said *J. R.* having then issue by his said wife, only one child, a daughter, named *S.* made his will as follows.

Item, whereas after my intermarriage with my wife *M. R.* I entered into certain articles and covenants to leave her the yearly income of 50*l.* to be paid to her out of my real estate, during her life, in case I should happen to die before her; and after her decease, to leave it, if I had more than one child, to the youngest child, if only two were living at her decease; but if I left more than two children, at my death, of her body lawfully begotten, then the said 50*l.* *per annum* to be equally divided amongst all such younger children, as should survive their mother, share and share alike, the said 50*l.* to be paid out of my real estate. Now my mind and will is, that I the said *J. R.* make it my earnest request to my wife, (as it will be much for
her

of the Judges of C. B., they were unanimously of opinion, that the contingent limitation

her advantage) that instead of the aforesaid 50 *l. per annum*, she would, for her natural life, accept of one full moiety of the yearly income of all my messuages, &c. situate, &c. in the town of, &c. and also one moiety of the yearly income of all my personal estates, and monies whatsoever, when my debts, &c. are discharged; and my will further is, and I do hereby give to my daughter S. the other full moiety of the yearly income of all my estate both real and personal, during the life of her mother, my debts, &c. being first discharged: but provided I leave my wife with child, and have a child born after my decease, that shall live, my will is, if it be a son, as the paddock is intailed upon the male heir, that, during his minority, his education and board be paid for out of the income of the paddock estate: but at the decease of his mother, if he survive her, he shall, during his minority, be intitled to one full half or moiety of the yearly income of my real and personal estate, and no more. My meaning is, that the 50 *l. per annum*, which by the marriage writings he may have a claim to, as the youngest child, after the decease of his mother, shall only be made up one half of my real and personal estate, and that after the decease of my wife M. R. my daughter S. R. shall enjoy the full half or moiety of the yearly income of my real and personal

ration over to J. M. was good, because it was so circumscribed, that it must take effect (if
at

sonal estate, as above mentioned, and likewise the half of the real and personal estate itself, when she attains the age of twenty-one, or on the day of marriage, which shall first happen. *Item*, my mind and will likewise is, that if my wife M. R. be left with child by me of a daughter, that during the natural life of my wife, the said daughter shall have an equal share with her sister S. R. of the one half or moiety of the yearly income, of both my real and personal estate: but at the death of their mother my daughter S. R. shall then have one full half of my real and personal estate, and the said other daughter (if she be living at the decease of my said wife M. R.) shall have the other full half of my real and personal estate. But if either of the said daughters should, before the age of twenty-one years or marriage, happen to die, the survivor shall have the other part or share of my said real and personal estate. But provided my wife M. R. *be not left with child* by me at my decease, I then give and bequeath unto my daughter S. R., if she outlives her mother, the whole of my real and personal estate, *at her mother's death*. for her to dispose of as she pleases, when she arrives at her age of twenty-one years. But if my said daughter S. R. die before she attains the age of twenty-one and unmarried, then my will is, that my loving wife M. R. if she
outlive

at all) within the space of twenty-one years, (after a life then in being).

So

outlive her said daughter, and have no other child living, of her body by me lawfully begotten, shall during her natural life, have the income of my whole real estate, or (in other words,) what it yearly brings in. And I likewise give her, my said wife, in case of my said daughter *S. R.*'s death under age, and unmarried, and my leaving no other child nor my wife with child by me, all my personal estate whatsoever, for her own use and benefit, and likewise to dispose of as she pleases. And I leave to her my said wife, for her use during her natural life, all my plate, linnen, &c. And in case of my daughter *S. R.*'s departure before her, and my leaving no other child, my said wife *M. R.* shall have the sole use and disposal of my said plate, &c. to do as she hath a mind with. *Item* if my dear daughter *S. R.* die before marriage, or attaining the age of twenty-one years, and my having no other child then living, and my wife being dead also, but not during the natural lives of either my wife or daughter, or any other child (son or daughter) that I may happen to leave of the body of my said wife by me begotten, &c. the will proceeds with many devises over, in case of this event.

After the making this will the testator had three more children by his said wife, *M. R.* *J. R.* and *B. R.* His wife died, and afterwards he died leaving

So where a term of years was settled in trust for the husband for life, then to wife for life,

Higgins v. Dowler, 1 P. W. 98. Vide Salk. 156.

ing his four children before named. S. R. his daughter attained twenty-one.

J. R. the eldest son of the testator, born after the will was made, claimed the estate. And one ground upon which he rested that claim was, that the testator intended *only* to dispose of his real and personal estate, upon the contingencies in his will mentioned; that the testator considered throughout, his wife as being to survive him. That S. R. could take nothing under the limitation. She could not take under the last clause, at the death of her mother; for she survived her mother.

That where a devise takes effect upon a contingency that never happened, it must be in order to effectuate the testator's intention. Such was the case of *Jones v. Westcombe*. The determination there was agreeable to the manifest intention of the testator's bounty. And that therefore the said J. R. the father ought to be considered as having died intestate, such will having been intended to take effect only upon events which never happened.

On the part of S. R. the daughter, it was insisted that by the letter of the will, the testator's daughter S. R. was intitled to all. His son J. R. was not mentioned in it. A mere awkward expression

life, then to the first son of the marriage and the *beirs-male of his body*, and in the same manner

should not defeat the intention of the testator : and his intention was altogether in favor of his daughter *S. R.* who was then born, and known to him, and for whom he appeared to have a great kindness and regard, and for whom he had expressly provided in various events particularized in his will. And though the contingencies of his wife surviving, or being enseint at the time of his death, never happened, yet the intent of the testator was, that in all cases she should take a full half. The eldest son *J. R.* was sufficiently provided for.

But the Court certified, that they were of opinion that the testator having left several children, besides his daughter *S. R.* the contingency upon which the real estate or any part thereof was devised to her, had not happened, and that therefore the estate descended to the eldest son, subject to the annuity of 50*l.* *per annum*, provided for the younger children.

But in the case of *Horton v. Whitaker*, 1 *Durnf. & East* 346. which was a case out of Chancery for the opinion of the court of King's Bench, the condition was confined to the life estate only on the ground of *such being the intent of the testator*.

In

manner to all the other sons successively, and for want of sons then to daughters; husband and

In this case *B.* after devising his real estates to his issue, if he had any; in case he should die without issue of his body, then devised the same as follows, viz. as to one moiety of the estates in *S. D.* and *R.* he gave the same to his wife her heirs and assigns. And being next desirous to provide for his sisters, but considering that his sister *M. S.* wife of *W. S.* was already well provided for, during the life of her said husband, and therefore would not, unless she happened to survive him, want any assistance to enable her to live in the world, he gave and devised all his real estates in the city of *O. C.* and *A.* and all other his estates in the county of *O.* to trustees and their heirs, in trust that they and their heirs, during the life of the said *M. S.* should receive the rents and profits, of the said estate, and pay the same to the testator's sisters *E. B.* and *M. B.* their heirs and assigns; and from and after the decease of the said *W. S.* in case the testator's sister *M. S.* should be then living, then in trust, as to one third part of the said last mentioned estate, to the use of the said *M. S.* and her assigns for life. And as to one other third part of the same estate, to the use of the said *E. B.* and her assigns for and during her life, and as to the remaining third, to the use of his sister *M. B.* and her assigns for and during her life; and after the death of any or either of his said sisters, then as for and concerning the third or share of her so

and wife died without having had any son, but leaving a daughter; and the question was,

first dying, to the use of the first and every other sons of her so first dying "in tail male" and in default of such issue "to daughters as tenants in common" and in default of such issue, then in trust, as to the part and share of her, so second dying, to the use of the remaining and surviving sister "for life, remainder to her first and other sons in tail;" and in default of such issue "to her daughters as tenants in common;" and "in default of such issue" then to the use of *J. S. H.* eldest son of *J. H.* and the heirs of his body, and in default of such issue, to the use of *T. H.* second son of *J. H.* and the heirs of his body, remainder to the use of all and every other son and sons of *J. H.* in tail male, remainder to *T. W.* and *A. W.* his wife and his heirs. And as to all that his real estate at *B.* in the county of *S.* and all other his real estate and estates whatsoever not therein before devised, which by settlement on his marriage, was or were settled upon his wife for life, and to such other uses and trusts as therein mentioned, in case he should die without issue, he did thereby give and devise the said last mentioned estate, after the death of his said wife, and all his right and interest therein, unto the said trustees, in trust nevertheless, to the like uses, intents and purposes, and subject to the like limitations as were mentioned and expressed concerning his estate in *O.* therein before devised to them.

The

was, whether she could take under this limitation, it being after a limitation in tail to the

The testator afterwards *died without issue*, leaving his said sisters *M.* the wife of *W. S. E. B.* and *M. B.* his co-heirs at law.

The testator's widow then died. Then *M.* the wife of *W. S.* died without issue, in the life-time of her husband.

Afterwards the testator's sister *E. B.* died without issue.

Then *M. B.* the testator's only surviving sister, died without issue.

Then *J. S. H.* suffered recoveries of the said estates.

And on a question respecting the validity of these recoveries, one question was, whether "the contingency of *M. S.* dying in the life-time of her husband," was confined to the life estate, or was to extend to all the subsequent limitations.

On one side it was contended, that from the situation of the testator's family at the time of making his will, it was manifest that he only meant to annex the condition to the life estate. After providing for his own issue, his next care was to make a provision

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the sons? Lord Chancellor *Cowper* held, that if the limitation to the sons had taken effect, that

for his two unmarried sisters, but he did not intend that his married sister should derive any advantage under his will, during her husband's life, because she was already sufficiently provided for. The testator had good reasons for annexing the condition to the life estate; for his general intent was, that *M. S.* should take nothing, unless she survived her husband; but after her death, the testator could have no reason for continuing this condition, for he intended that all the limitations should take effect.

On the other side it was insisted, that according to the grammatical construction of the testator's will, the condition or conditional limitation annexed to the life estate was likewise annexed to all the subsequent limitations. The court could only judge of the testator's intent from the will itself. It was extremely clear that the testator intended to annex this condition to all the subsequent limitations; for if it were confined to the life estate, this absurdity would follow, that *W. S.* might survive the two other sisters, and the trustees should still receive the rents and profits of the estates, notwithstanding the death of the three sisters without issue; but that if *M. S.* survived her husband, then one of her sisters must be living when the estate *pur autre vie* determined. So that there would be no contradiction,

that to the daughters must have been void ;
but as there was no son, the latter limitation
was

diction, if all the subsequent limitations depended
on that contingency.

The court certified that they were of opinion
that *J. S. H.* under the limitations of the said will,
and the recovery suffered by him, took an estate in
fee-simple.

The consequence of which is, that the condition
or conditional limitation was confined to the estate
for life only.

But in the case of *Doo v. Brabant*, 3 Bro. Chan.
Ca. 393. where *A.* by her will gave 1000 l. 3 per
cent. consol. annuities, and other effects, to trustees
in trust, for *S. C.* of the age of twelve years, until
she should attain her age of twenty-one years,
then to transfer the said sum to the said *S. C.* her
executors and administrators, to and for her own
use and benefit: and in case the said *S. C.* should
die under the age of twenty-one years, leaving any child
or children of her body lawfully begotten, then in
trust, for all and every such child or children who should
live to attain his, her, or their age or ages of
twenty-one years, to be divided equally between
them, &c. But in case the said *S. C.* should die
under the age of twenty-one, without leaving any child
or children, or being such, they should all die under

was good, for the construction must be, if a son then to him, if no son then to a daughter.

But

twenty-one, then in trust for testatrix's three nieces, *M. O. R. O.* and *S. O.* equally to be divided among them.

S. C. married *B. D.* attained twenty-one and died in the life-time of the testatrix, leaving *E.* and *F.* her only children, surviving her. And soon afterwards *A.* the testatrix died. *M. O.* and *S. O.* two of the nieces died also in the life of the testatrix, and *R. O.* married *B.* And *B.* and *R.* his wife, claimed in her right, the trust money mentioned in the bequest upon the contingencies, as having lapsed by the death of *S. C.* in the life-time of the testatrix. *E.* and *F.* claimed also the bequests in the will, and filed a bill in Chancery to have the same secured for their benefit.

Lord *Thurlow* on the hearing was inclined, after a consideration of all the cases, to decide in favour of the children of *S. C.* they having been born before she attained twenty-one, considering this case as falling within the old rule, that where there is a particular estate created with a remainder over, and the first estate is void, the second estate shall prevail, as if it were an original estate; though he admitted there were no cases of executory devises of this sort: but whether it was by way of executory devise, or contingent remainder, the law seemed to be, that where the event had actually happened,

But *Salkeld* says, upon reading the settlement, it appeared to be *and in default of issue-
male*

happened, the case would fall under the same reasoning, as if it were given as a remainder. And his Lordship thought that the case of *Calishorpe v. Gough* stated *supra* 411. ought not to stand.

But on a case stated, as upon leasehold property, for the opinion of the Court of King's Bench, for their opinion, whether the children of *S. C.* took any, and what estate in the said leasehold premises, by virtue of and under the will of the said *A.* the Court rested their opinions *on the intention merely*. Lord *Kenyon*, Ch. J. said, nothing could be more clear than the words of this will. The devise was to *S. C.* when she should attain the age of twenty-one, and if she should die under twenty-one leaving children, then to those children; but she did not die under that age, and therefore nothing could pass to the grandchildren. If this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the grandchildren; but as she had not done so, they could not make a will for her. This case was distinguishable from *Fonereau v. Fonereau*, *White v. Barber*, and *Doe v. Shippard*, (*vid. supra*) for here nothing was given to the grandchildren, but upon an event which did not happen. *Ashhurst*, Just. was of the same opinion. *Buller*, Just. The testatrix intended

male of the body of the husband, then to the daughters, and so the husband took an estate-tail,

ed to give the whole to S. C. if she attained the age twenty-one, and the children nothing. She did attain that age, and therefore nothing was intended to be given to the children in that event. There was a distinction in some of the cases, as *Willing v. Barrie*, and a case there referred to, between words giving a remainder over, and an original devise; in those cases the devise was good, not as a remainder over, but as an original devise: but here was no original devise to the grandchildren, but on an event which did not happen. *Grose, Just.* The event which has happened, was not foreseen and therefore not provided for. The court certified, they were of opinion that *the children of S. C. took no estate whatsoever* in the said leasehold premises, by virtue of and under the will of the said S. C. the events upon which the limitation, under which their claim was to take place, not having happened. *Vid. 4 Term Rep.*

So in the case of *Roundel and Currer*, 2 *Brown's Chan. Rep.* 67. Where S. C. devised her real estates to J. R. for life, provided he took the name of C. remainder to his first and other sons in tail male, remainder to her cousin R. R. son of her cousin H. R. in tail male, remainder to T. R. the second son of H. R. in tail male, remainder to D. C. in fee, with

tail, and therefore the subsequent limitation to the daughter was void. However, Sir

Joseph

with powers to the tenant for life of jointuring and portioning.

After the death of the testatrix, *J. R.* entered and took the name of *C.* Then *H. R.* and *R.* his son, the devisee over in tail, both died in the lifetime of *J. R. C.* by which the remainder in tail vested in *T. R.* the second son.

J. R. C. purchased additional estates, and being desirous that the two estates should go together, he devised part of his own lands and also the lands devised to him by *S. C.* to trustees to be by them conveyed to other trustees to the use of *T. R.* for life, remainder to his first and other sons in tail male, remainder to *R. R.* and his heirs male, remainder over. The devise was upon express condition that *T. R.* should within six months, suffer a recovery, and bar the remainders in *S. C.*'s will, and convey all his estates to such persons, &c. as were declared by his will, and convey all her *S. C.*'s estates to such persons, &c. for such uses as were declared by his will, as to his own estates, and no conveyance of his estates to be made before *T. R.* had suffered the recovery, and in default of his suffering such recovery to convey his estates to other trustees, to the use of *R. R.* for life, with remainder, &c.

By

Joseph Jekyll afterwards in the case of *Stanley v. Leigh*, said this was a mistake. And indeed

By codicil (not having disposed of his personal estate) he gave his personal estate to *T. R.* on condition of his performing the condition in his will, and if he should refuse so to do, then he gave it to trustees to lay out in lands, to the uses declared in his will as to his own estates.

T. R. after the death of *J. R. C.* changed his name to *C.* and did several acts of ownership respecting the estates of *J. R. C.* and made some preparations for suffering a recovery, but died before any recovery was compleated, leaving his wife, enfeint of a daughter.

T. R. C. was heir at law to *S. C.* *J. R. C.* and *D. C.* consequently his daughter was so. If *T. R. C.* had performed the condition of *J. R. C.*'s will *R. R.* was intituled under the limitations in *S. C.*'s will; if not, upon his (*T. R. C.*'s) death, the estate-tail was spent, and the reversion to the right heir of *D. C.* was fallen in to *T. R. C.*'s daughter.

And the question in a cause at the Rolls was, whether *T. R. C.* had intituled himself to *S. C.*'s estates.

It was contended on the part of *R. R.* that this was a case of election and that *T. R. C.* had done sufficient to make an election and bind his daughter
to

deed it is observable, that although an indefinite failure of issue-male of the body of the husband

to do what was necessary, to settle his estates according to *S. C.*'s will.

But his Honor was of opinion, that this was not a case of election; but that it was a condition precedent. The plan he said was, that before *T. R. C.* should have intitled himself to the estate, no conveyance should be made. The means by which it was to be effected, was, that he should suffer a recovery, and he would not say, that any other conveyance would answer the intent. The testator had directed the means, and none so proper to perform the intent. In fact no recovery was suffered. Here the estate was to be conveyed upon a certain act to be done, which amounted to a price. He was to take care that at all events, the estate of *S. C.* should be so conveyed, as to go to the uses of *J. C.*'s will. He ought in his life-time to have obtained such an estate as he could convey. Therefore the daughter was not bound to convey *S. C.*'s estates. The consequence was that the estates of *J. R. C.* would go to *R. R.* and the same argument applied to his personal estate, which must be laid out to the same uses.

In the case of *Vessey* against *Wilkinson*, 2 *Durnf. and East* 209. which arose on a special verdict the Court

husband would have been too remote, yet as he took an exprefs estate for life before, and this was

Court were divided in opinion, but all the judges considered the question *to turn upon intention, merely.*

In this case *M. W.* widow of *J. W.* previous to her marriage with her first husband *G. W.* (then *M. S.* spinster) was seised in fee of the premisses in question, and which, after her first marriage, in consequence of marriage articles, were vested in, and settled on *G. W.* in fee. *G. W.* died intestate leaving issue an only daughter *A. M. W.* who died an infant and without issue, by which *J. W.* became heir at law of *A. M. W.* Afterwards by indenture between *M. W.* the widow, *J. W.* the younger brother and heir of *G. W.* and *A. M. W.* and other persons, after reciting the articles and settlement, all the premisses in question were settled to the use of the widow for life, *sans waste*, remainder to trustees for a term of 500 years, upon the trusts after-mentioned, remainder to the use of *J. W.* for life, remainder to trustees, to preserve Contingent Remainders, with remainder to the first and other sons of *J. W.* in tail, remainder to his daughters in tail, remainder to *M. W.* in fee. After the execution of this settlement, *M. W.* the widow intermarried with *J. X.* by whom she had issue one daughter *M. X.*—*M. X.* the widow, in her will, after reciting the last settlement, declared the trust of

was not the case of an inheritance, it by no means follows that he took any estate by words

Vide supra,
P. 384. 391.

of the term of 500 years to be "that if her said brother *J. W.*, or any issue of his body, should be living at the time of her decease, then the said trustees were immediately after her decease, out of the rents and profits of the said premisses, or by mortgage thereof or otherwise as they should be advised, to raise and levy the sum of 1000 *l.* with lawful interest for the same from her death, and pay the same at the end of six months next after her decease, to such person or persons; and to such uses, as she by any deed or will should direct, limit and appoint" proceeded thus. "Now I the said *M. X.* by means and virtue of the power above-mentioned, and by virtue &c. "do" in the case last above-mentioned, (that is to say), *If my said brother, Mr. J. W. or any issue of his body be living at the time of his death, direct, limit and appoint, that the said trustees shall and do pay the said sum of 1000 l. and the interest due for the same, after they shall have raised and levied the same, unto my son in law, Mr. A. X. his executors, administrators, and assigns, he or they giving his or their bond, as security for the payment of the several annual and other sum and sums of money next herein after mentioned, to the several persons herein after named (that is to say) &c. (here follow several legacies, and annuities.) And in case neither the said J. W. nor any issue of his body, should happen to be living at the time of my decease, by which event,*

Vide
 Vaughan v.
 Farrer, 2
 Vez. 182.

words of implication; and the words *in default of issue-male* might well refer to such default of issue-male as was before expressed.

Again,

*event, the same manor, by virtue of, and under the limitations in the said recited indenture of release and settlement, will devolve upon me and my heirs; then I do hereby give and devise the same premisses, and every part thereof, unto the said trustees, their executors administrators and assigns, for and during the term of 500 years, in trust that they immediately after my decease, shall by mortgage of the said premisses, or otherwise as they shall be advised, raise and levy the said sum of 1000*l.* with lawful interest, for the same, from my death, and pay the same, within six months after my decease, unto my said son in law A. X. his executors administrators and assigns, he or they giving his or their bond security for the payment of the said several annual and other payments herein before mentioned to be paid by him, in case the said other sum of 1000*l.* payable upon the contingency before mentioned, had become payable and been paid as aforesaid; and in further trust, that they the said trustees, do and shall, by the ways and means aforesaid, raise and levy the further sum of 1000*l.* within six months next after my decease, and pay the same as follows viz. (here follow several legacies and annuities). And from and after the expiration, or other sooner determination, of the said term, and subject thereto, I give and devise the*

Again, where a testatrix devised a term of years in trust (after payment of debts, &c.) for Stanley v. Leigh. 2 P.W. 618.

the said manor, &c. unto my mother *M. S.* and her assigns for life, and from and after her decease, I give and devise the same, unto my daughter *M. X.* her heirs and assigns for ever, but in case my daughter *M. X.* shall happen to depart this life, before she shall attain her age of twenty-one years, and without leaving issue of her body lawfully begotten, who shall attain that age; then I give and devise the said premises, and every part thereof, with the appurtenances unto my said son in law, *A. X.* his heirs and assigns for ever; he or they paying thereout, within six months next after he or they shall come and be in the possession thereof, the several sums of money following, to wit, the sum of, &c. Also I give and bequeath all the rest residue and remainder of my estate and effects, of what nature or kind soever, and wheresoever, as well real as personal, unto my said daughter *M. X.* her heirs executors, administrators and assigns, for ever, subject to her debts and funeral expences. *M. X.* soon afterwards died. Then *J. W.* the brother of *G. W.* who survived *M. X.*, the mother died without issue; *M. X.* the daughter also died an infant unmarried, and without issue. Then *M. S.* the mother of the testatrix died. *A. X.* the son in law also died, and the defendant *J. X.* was his heir at law. The lessor of the plaintiff *S. N.* was heir at law to the testatrix *M. X.* and heir at law on the part of the

for *F.* for life, and after his decease for his first son and the heirs-male of his body, and
in

mother to *M. X.* the daughter. The question was whether under the circumstances above stated, the plaintiff was entitled to recover or not? Upon this question the court were divided in opinion, Mr. Justice *Grose* and Mr. Justice *Asphurst* being of opinion with the plaintiff, and Mr. Justice *Buller*, with the defendant. They all agreed that it was a question of intention, but they differed in opinion as to the intention, as evinced by the dispositions made by *M. X.* the mother.

Mr. Justice *Grose*, and Mr. Justice *Asphurst*, as the basis of their argument, assumed the principle "that to defeat the heir, it must appear to be the clear intention of the testatrix, collected from the will, either by express words, or necessary implication, that the devisee should take. They contended that from the nature of the testator's interest in the property, under which it might vest in her during her life, or not until after her death, she might dispose of it in both events, or in one of those events only; if she intended only to dispose of it in one event, *viz.* in the event of its vesting before her death, if that event did not happen, it would be undevised, and go to her heir at law. And they contended from the words of the devise. "*And in case neither the said J. W. nor any issue of his body, should happen to be living at the time of my decease, by which*
the

in default thereof to the second and other sons of F. severally and respectively, in order and course,

the said manor, &c. will devolve on me and my heirs, then I give unto the said trustees to raise the sum of 1000*l.* &c. and in further trust to raise 4000*l.* within six months after my decease," and the application of the money as directed by her, and from the subsequent disposition of the fee, to her mother for life, and her applying her attention to living persons throughout, she must have had in contemplation a disposition throughout, on the contingency only of the estate vesting, during her life. They insisted that the question was not, whether the testatrix intended or not to die intestate, "*but whether it appeared upon the face of the will, to have been her intention in the event which had happened to die intestate,*" or to dispose of this estate. That the court had only a right to determine, what the testator meant to do, and had actually done, upon the circumstances in his contemplation at the time of making the will, and had no right to consider what the testator might probably have done, had certain circumstances been propounded to him, which he did not think of, at the time of making the will; for this would not be putting a construction upon the will made, but making a will for him. This they said was *the chance the law gave, to the heir at law*. He had a right to take advantage of the slips and omissions in a will, and they could not take it from him.

(410) course, as they should be in seniority of age and priority of birth, and the several heirs-
male

Mr. Justice *Buller* agreed with his brother Justices in their principles, but he considered the contingency of *J. W.*'s dying without issue in the life-time of the testatrix as annexed to the term only; and that when she afterwards in disposing of the inheritance, made use of the words "from and after the expiration or other sooner determination of the term and subject thereto, I give, &c." she meant only, subject to that term which should be in being at her death. She considered both terms as one term, and meant if *J. W.* died without issue in her life-time, still the trustees should have the term created by the settlement, but for more extensive purposes. If this construction of the words "subject to the term" were right, it put an end to the case, for then it was a plain devise of a remainder, subject to a term of 500 years. If the testatrix had not interposed the trusts of the term, between the limitations to the trustees for 500 years, and the devise of the inheritance, but declared those trusts by a subsequent part of the will, the will would have stood thus "I give the premises to trustees for 500 years, if neither *J. W.* or any issue of his body shall be living at my death, and subject to that term, I give the same to *A. X.* and his heirs. In that case though the term never took place yet the remainder would. The order in which the trusts of the term were created, could not vary the true construction of the will :

male of the respective bodies of such son and sons, and in default of such issue, to the use of

will : considering this case on the will only, without reference to the settlement, it was in substance a devise of a remainder in fee, subject to a term, if a particular event took place, but if that event did not happen, then without being subject to that charge. The court was at liberty to transpose and mould clauses, and words of the will, so as to make the whole take effect. This construction gave operation to every part of the will, and in each given event, her whole estate would pass by the will, which is what she intended. But a contrary construction, in the event which had happened, would expunge all the limitations of the inheritance, even that to her own daughter, and after her to *A. X.* who seemed to be the next object of her bounty, and he said, he thought it plain, that the testatrix meant to dispose of her whole property and all the interest in that property by her will.

Upon the whole therefore, it seems that upon a close investigation of the entire series of cases upon this point, if we class them according to the several grounds on which the decisions thereupon appear to be founded, the result to be drawn from a general comparative view of them is, that *the construction* of them proceeds intirely on the *apparent intent* of the testator, and they ultimately depend upon the

of the daughter and daughters of *F.*, and if more than one, to be divided among them
share

principle, that the court is to put such a construction upon the whole of a will, as will best effectuate the general intention of the deviser, without paying a particular attention, to the letter, if a different construction will defeat the general intent.

But although where a devise is made upon a condition annexed to a preceding estate, if the preceding limitation or contingent estate never should arise or take effect, the subsequent remainder over *may* nevertheless take place, if such remainder be not *too remote*, it continues yet to be decided what shall be the effect of a condition annexed to a *preceding* estate, *which* is *too remote*, and consequently makes the ulterior limitations equally remote in *their creation*.

In order to investigate this question, we may suppose in the case of *Jones v. Westcombe*, stated *supra* 400. by Mr. *Fearne*, the estate to have been limited to the wife for life, and after her death to the child she was then *enfeint* with, if it should attain the age of twenty-five years of age, and if *such* child should die before the age of *twenty-five* (instead of) twenty-one years, the remainder over. In which view of it, the executory devise not being originally confined to the legal limits, the question would have
arisen,

share and share alike at their ages of twenty-one or marriage, and in default of daughters,
or

arisen, whether the subsequent event could have given it effect.

This is a question of great difficulty, but as far as may be judged from the application of general principles, and analogous cases, it seems most probable, that in such case the first limitation being an executory devise, too remote to be valid, that which, as an alternative to it, is ultimately postponed to the same limits, will be considered equally remote, and consequently equally void; for admitting the limitation to the supposed child to be void for remoteness, it seems to follow, that the alternative limitation must be void too, as its effect was not *in its* creation restrained to any shorter period; and if it was too remote in its creation, I should apprehend no subsequent event could render it valid; and so the law was laid down by Lord *Mansfield*, in delivering the judgment of the Court of King's Bench, in the case of *Goodman v. Goodright*, stated by Mr. *Fearne*, *supra* 338. in which case the limitation to the heirs male of the body of *B.* by a future husband, being treated as void, and the limitation over to *L.* as an executory devise, and consequently too remote, as such, it was contended that the devisee over took an immediate estate, as if there had been no precedent devise, as the precedent one was *totally* and *absolutely* void; and that the issue of *B.* by a future husband

or in case of their death, before twenty-one or marriage, to *P.* for the then residue of the

was a matter that ought to be laid quite out of the case, in the same manner as if there had been no such devise, since the event never happened. But his Lordship said "*supposing the devise in that case) to the heirs of the body of B. by a second husband to be void*, the limitation to *L.* and the heirs of his body could not be a contingent remainder, for want of a preceding estate; and it was too remote as an executory devise, being not to take place till after an indefinite failure of issue of the body of *B.*; and *being too remote in its creation*, the event could not vary the construction: so that the death of *B.* without issue, could make no difference in the case. And upon the same principle in the case I have supposed, considering the limitation to the supposed child as an executory devise, *too remote in its creation*, because not confined to take effect within the limits allowed to such estates, it seems that the subsequent event of their being no such child, could not vary the construction,

And so far as the opinion of the Court, under such a state of the case can be collected, from the sentiments thrown out, in the case of *Jones and Westcombe*, it seems probable from the stress therein laid on the existing circumstances of the case before them, when they said "it was good as an executory devise, to commence *within twenty-one years after*

the term. *F.* died without having had any issue. Sir *Joseph Jekyll*, after a very learned and

after a life in being ;" and that the number of contingencies were not material, *if they were to happen within a life in being, or a reasonable time after*, that the resolution would have been different had the circumstances of the case been such as I have put for the sake of investigating this question ; because it is obvious that their resort to this doctrine would have been useless, if the effect of the devise in the event that happened would have been the same, whether the contingency had originally been confined to twenty-one, or extended to twenty-five years.

Possibly it might be contended in support of a devise so constructed, that as the event of the wife's not being enseint, equally included the *two* contingencies, of her being enseint at all, and her being enseint of a child, who should however not answer the description, the limitation over upon the *former* event, in case it happened, not being too remote, might take place ; for where an executory devise is limited on two contingencies, one of which is within the requisite limits, it may take effect, if *that* contingency happens, as in the case of *Longhead* *vers. Phelps*, 2 *Black. Rep.* 704. stated *supra* 154. in notes. In respect to this it seems, that if the testator *had expressly distinguished between the two contingencies*,
by

and elaborate argument, and a thorough examination of the several authorities on the point

by mentioning both of them *disjunctively*, as in the case last mentioned, *its validity* would have been *unimpeachable* on the happening of the *first* of them, and the devise over would have been intitled accordingly; indeed had the devise over been in case the wife should have "no child" it would have been confined to proper limits, and have taken effect if that event happened: but the words "if such child" are, by force of the word "*such*" as clearly equivalent to such child who should *die before the age of twenty five*, as if those *very* words had been actually repeated, under which state of the limitations there appears nothing to distinguish the case supposed, from the common case of an executory devise after a person dying *without issue*, or for *default of issue*, where, *though* the event described, actually includes the *two* distinct contingencies, of the persons *never having* or *leaving* any issue, which would clearly be within the legal limits, as well as any *future extinction* of issue, once had, still it has been established by repeated decisions, that the devise shall be equally void, whether there happens to be any such issue or not, agreeable to the doctrine laid down, as clear law, in the case of *Goodman and Goodright*, as well as to the grounds of decision in the case of *Longhead and Phelps*, which proceeded on the express distinction *there made* by the testator, between

point and investigation of their principles, held that the limitation to *P.* was good in event,

between the two events, in the *disjunctive* provision for them: and though cases might be put where the validity of an executory devise may be *originally* contingent, and its effect depend upon the *future existence*, or *ascertainment* of the person, to whom the estate is antecedently limited, as in the cases of *Higgins* *vers.* *Dowler*, 1 *Peer Will.* 98. stated *supra* 408. in the context, and *Stanley* *vers.* *Leigh*, 2 *P. Will.* 418. stated also *supra* 409. and other cases of a similar description, yet they were cases of *that sort*, in which the *existence* or *ascertainment* of the prior *contingent* devise, must *necessarily*, in any *possible event*, be ultimately *decided* within the period of *a life in being* or of *twenty-one years after*; as in case of a devise of a chattel interest to the first son of *B.* and the heirs male of the body of such first son, and in default of such issue remainder over; where the period for the *ulterior* limitation taking effect is *necessarily restricted* to the time of *B.*'s death, when it must be determined, whether he will have any son or not; for if he should have a son, that son would take *absolutely* in *total exclusion* of the limitation over. And so if a devise be to the first son of *A.* attaining twenty-one years, and in default of such issue, then over, there, in all events, the effect of the *ulterior* limitation, is confined to the period of twenty-one years after the decease of *A.* within which time it must be decided, whether he will have a son

event, as the limitation to the sons, &c. had not vested.

Indeed

a son to answer the description required.—But every one of these cases, wherein the validity of the executory limitation has been referred to the *limits* to which its effect was *originally and ultimately restrained*, viz. a life in being or twenty-one years after, are so many authorities *against the validity of a limitation* whose effect is not *originally* confined to a *similar period*; under which *latter* description the case I have supposed appears to fall. And, therefore, whatever arguments or distinctions a disposition to support the devise over, might suggest to the courts upon such an occasion, the cases and authorities relative to the point, against the validity of a limitation over, *so circumstanced*, on account of the original *eventual remoteness* of the devise, *as not restrained in its creation*, to a *shorter period* than *twenty-five years after a life in being*, seem to me too strong to be got over.

Possibly the case of *Scatterwood v. Edge*, 1 Salk. 229. stated also *supra* vol. 1. 163. might be referred to as an authority for the devisee; in a case similar to that I have suggested; but a similar observation to what has been made on the case of *Jones v. Westcombe*, in regard to a material difference between it and the present case, seems applicable to that of *Scatterwood v. Edge*, viz. “that the *ulterior devise* was not

in

Indeed in the case of *Clare v. Clare* above cited, Lord *Talbot* seems to have held a different

Vide *Stephens v. Stephens*, infra, 411. decided by Ld. *Talbot* himself.

in its creation too remote;" for the devise there to the first son of *C.* was not in its creation executory *beyond the death of B.* on *whose death* the event of *B.* having a son *must have been decided*, and the ulterior limitations (subject only to the term of eleven years) then have vested in the first son of *C.* as a remainder expectant on the estate-tail, in the son of *B.* if there was any, or else in possession in failure of such son; the devise to the first son of *C.* was not postponed, in any possible event, *beyond the legal limits*; because the prior limitation to the first son of *B.* to, or upon which, that to the son of *C.* was to take effect, either as an alternative, or as a remainder, was confined to the legal limits; whereas in the case suggested the first limitation to the child, the wife was then *enfeint* with, if it should attain the age of *twenty five*, not being confined to an event, which must happen, if at all, within the legal limits, the alternative limited in failure of it which was not to take effect at all, till the other should be decided, and of course was made dependant *on the determination* of a contingency *eventually* too remote, was not originally confined to the legal limits, and was therefore too remote in its creation.

Upon the whole the distinction seems to be between the first limitation *being*, and *not being* too remote

ferent opinion ; but, however, the uniform tenor of subsequent decisions has thoroughly established

remote in its creation. Where that is *too remote in its creation*, the alternative one appears to be *equally* so, and, then, according to the apparent preponderancy of authorities, it is apprehended *no subsequent event* can vary the construction, or give it effect. But where the first limitation is *not too remote in its creation*, there, it rather seems, that the *ulterior* limitation *not being too remote in its creation*, whether limited to take effect *only* as an *alternative* to the first, or *equally* as an *alternative* to or remainder upon it, may, if the prior limitation, whether *originally* (for any other cause than remoteness) or by *subsequent event*, be put out of the case, take place immediately. This is the distinction that seems to pervade and reconcile, all the cases upon the subject. For, even in that of *Goodman v. Goodright*, above stated, it appears that the court founded their opinion upon the *too great remoteness* of the antecedent devise, to the heirs of the body of *B* by her second husband, according to what is stated in a note upon that case, *Dougl. Rep.* 489. stated also *supra* 143. *

* A case of the above sort was laid before Mr. *Fearne*, for his opinion at a very late period of his life, on which he delivered his sentiments to the effect in the above note; but as his opinion was of so very late a date, and the revealing

established the doctrine which prevailed in these cases of *Higgins v. Dowler* and *Stanley v. Leigh*.

And so where a testator devised Exchequer-annuities, plate, and the residue of his real and personal estate to *M.* at twenty-one years of age, and in case *M.* should die before twenty-one, then to *M.*'s mother and such other child or children as he should thereafter have, and for want thereof to her executors and administrators, and afterwards by a codicil declared, that in case *M.* should die before twenty-one, and his mother should die without any other children or child by *C.* her husband, then all the premises should go to *W.* his heirs and assigns. Upon a question whether this devise over was good? The court held clearly that it was.

Studholme v. Hodgson,
3 P. W. 300.

(411)

And in another noted case, where a devise was in these words: "I give and devise unto my grandson *W.* after the decease

Stephens v. Stephens,
Cas. Temp.
Talb. 228.

vealing the circumstances might lead to discoveries, with which he was intrusted confidentially, to obtain his opinion, I have preferred forming the case on fictitious circumstances, to publishing the real case; and I was lead to introduce it, from a reference made by him to it, in his copy of the original work.

"of

(412)

“ of my wife, all the lands, &c. to him, *his*
 “ *beirs and assigns for ever*; but in case my
 “ said grandson *W.* shall happen to die before
 “ he attains the age of twenty-one years, then
 “ I give and bequeath to my grandson *T.* all
 “ the said lands, &c. to him, *his beirs and*
 “ *assigns for ever*, but in case my said grandson
 “ *T.* shall happen to die before he attains
 “ twenty-one years, then I give all the said
 “ lands to such other son of my daughter
 “ *M. S.* by *T. S.* as shall happen to attain his
 “ age of twenty-one years, *his beirs and as-*
 “ *signs for ever*; the elder of such sons to take
 “ place before the younger, one after another,
 “ in order and course as they and every of
 “ them shall be in seniority of age and pri-
 “ ority of birth, and of the several and re-
 “ spective *beirs male* of the several and respec-
 “ tive body and bodies of all and every such
 “ son and sons, and the heirs male of his and
 “ their body and bodies issuing, and for de-
 “ fault of such issue, then I give and bequeath
 “ the said lands, &c. to all and every the
 “ daughter and daughters of the said *T. S.* on
 “ the body of my said daughter to be begot-
 “ ten, and to the heirs of the body and bodies
 “ of all and every the said daughter and
 “ daughters as tenants in common, and not
 “ as jointenants, and for want of such issue,
 “ then

" then I give, devise and bequeath the said lands to Sir R. S. his heirs and assigns for ever." And the testator gave all the residue of his real and personal estate to the said T. S.

W. and T. both died under age and without issue; T. S. having a son A. and daughter B. by his said wife M. S. (and having had other daughters who died infants) the said T. S. claimed the lands as residuary devisee under the said will. His wife M. S. claimed the same lands at heir at law of the testator, whilst A. and B. and Sir R. S. claimed under the limitations in the will. Whereupon a case was stated for the opinion of the Judges of K. B. what estate, right or interest either present or in contingency any of the said parties had in the lands in question?

The Judges, after observing that the principal point was, whether the devise over, upon T.'s dying under twenty-one years, to such other sons of M. S. as should attain twenty-one years of age, was good by way of executory devise; said, that they found no other case but that of *Taylor v. Biddal*, where an executory devise of a freehold suspended till a son unborn should attain the age of twenty-

(413)

Supra, p.
318.

one years, had been held good. Yet, upon the authority of that and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation would not be thereby restrained longer than the law would restrain it, *viz.* during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity, they were of opinion the said devise was good by way of executory devise.

(414)

That then, all the subsequent limitations would be good ; for the estate would vest in *A.* at his age of twenty-one in tail-male, pursuant to the clause directing the order of succession between the sons to be born. If *A.* died under that age, it would vest in any other son of *M. S.* by *T. S.* who should attain twenty-one, in the same manner as it would have vested in *A.*; and if *A.* died under that age, and there should be no such other son who should attain that age, the estate would go to *B.* and all the daughters of the said *M. S.* and *T. S.* as tenants in common in tail, with remainder in fee to Sir *R. S.*; and if *A.* should die under that age, and *B.* should then be dead without issue, and there should be no other son of *T. S.* and *M. S.* who should attain the said age, nor any other daughter of them, then

then the estate would go to Sir R. S. by virtue of the remainder to him in fee.

And where there was a devise of an estate to A. for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail-male, remainder over to T. and the testator willed that his plate, jewels, library of books, furniture in his mansion-house and in his dwelling-house should go as heir-looms, (a) as far as they could by law,

to

Barnardist.
Rep. in
Chan. 54.
Gower v.
Grovesnor.
and vide
Trafford v.
Trafford, 3
Atk. 347.
And Duke of
Bridgewater
v. Egerton,
2 Vez. 122.
infra 470.
in note.

(a) Mr. *Fearne* in a former part of this volume noticed the cases on this subject of heir-looms, with regard to their specific distinctions or relations, and has mentioned his intention to treat further on this modification of property, in a subsequent part of this essay; and as questions upon it involve matters of very great importance in respect of the frequency of these clauses in wills, marriage articles and settlements, I shall therefore take this opportunity to notice some circumstances, in relation to the *effect* of limitations, of real or personal chattels through the medium of trusts, either together with, or by reference to limitations of freeholds in the same or any other instruments, and the extent to which such limitations may be carried.

It seems now settled, that a limitation of leaseholds, or mere personal chattels in strict settlement,

H h 2

where

to the heirs-male of his family successively, as his real estate was thereby settled.

A.

where the personal estate is either, included in the same limitation as the freehold estate, or by reference to a limitation of freehold estates in strict settlement, is to be understood, in the same manner, as if the words used in the limitation of the freehold estates were repeated in regard to the leaseholds or personal chattels; and consequently that the first tenant in tail who comes into *esse*, becomes absolutely intitled to the personal property, subject only to the antecedent *particular* estates therein, though it frequently produces a separation between the real and personal estate. This is a construction agreeable to the letter, and in conformity with the obvious meaning of the language used in such cases; for the first tenant in tail of the lands, being expressly to *take the same* estate in the chattels, as he takes in the freeholds, must take such an estate in the chattels, as he would have done under a like limitation, applied to the chattels only, which would be an estate tail. And courts are glad of any opportunity, to prevent the suspension of the vesting of property, as operating against public policy in a commercial nation.

The case of *Gregory* vers. *Pelham*, reported 5 *Bro. Ca. Parl.* 435. is an instance of the first sort in which A. after devising particular parts of his real and personal estates gave all other his honors, castles, manors, &c. as well leasehold and copyhold

A. died without issue, the question was, whether the limitation of the said plate, &c. over

as freehold, wheresoever, and of whatsoever nature and quality they were, and every of them, with their and every of their rights, &c. in manner following, viz. unto *B.* for life, remainder to his first and other sons in tail male successively, remainder to *C.* for life, remainder to his first and other sons in tail male with other like remainders over. Afterwards an act of parliament was procured, whereby the said will was ratified, established and confirmed, except as to particular premises therein mentioned. *B.* enjoyed the premises during his life, and died without issue. *C.* had issue two sons *E.* his eldest son and *F.* his younger son, both of whom died in his life-time infants. And a dispute arose whether the leasehold estates subject to the estate for life of *B.* and the contingent Remainder to his sons, belonged to *B.* on the ground that the *absolute estate* and *interest* of and in all such estates, held by leases for years, *subject* to the estate of *B.* and the limitation to his sons in tail, and *C.*'s estate for life, was *part of the personal estate* of *E.* the eldest son of *C.* at his death, and as such, on his death (he dying intestate) did belong, subject to the estate for life of *C.* and to the contingency of *A.* having a son, to *C.* as his father and only next of kin, or to the person next in remainder; and the remainder-man filed a bill in support of his claim. But his bill was dismissed by Lord

over to *B.* was good in event, as *A.* had never had any issue? For it was agreed, that the clause

Henley, Chan. Afterwards the same question was agitated in the House of Lords, on a different suit; and two questions were put to the judges. First, Whether the property of the leasehold estates for years devised by the will of *A.* vested in *E.* the infant son of *B.* deceased, subject to *B.*'s interest therein for life, and the contingency of his having a son. Secondly, Whether the property of the said leasehold estates, subject as aforesaid, was transmitted to the representative of *E.* the infant? And the Lord Chief Baron of the Exchequer, and Mr. Justice *Denison* being present, delivered their concurrent opinion upon these two questions, in the affirmative. And the House of Lords ordered and adjudged accordingly.

The case of the Duke of *Bridgewater* vers. *Egerton*, is an instance of the second sort.

In that case *A.* having formerly on his marriage settled his real estates in strict settlement, devised his capital house at *E.*, &c. and all his leasehold houses, stables, and coach-houses adjoining thereto, with their appurtenances, and also the use of his pictures, household goods, and furniture in the said house, and the use of all his plate both in town and country, to his wife *B.* during her widowhood, and desired his executors to take an inventory thereof, but

clause respecting the plate, &c. by referring to the settlement of the real estate, amounted to

but declared it to be his will, that when his eldest son for the time being, should have attained his age of twenty-one years, or be married, he should, in case he desired the same, (and gave six months notice in writing to the wife,) have the said houses, pictures, household goods, furniture and plate, as also his coach-houses, and stables, for his own use, paying to the wife 400 l. a year during her widowhood. He desired that *all his books both in town and country* should be deemed and taken as heir-looms, and should go to such person as should be intitled to the possession of his capital mansion house at *A.* by virtue of the limitations in his settlement, and he gave the residue of his personal estate to his son. *A.* died leaving two sons and two daughters; *B.* the wife married again, the eldest son died under twenty-one intestate, and *B.* administered.

Afterwards the second son claimed the books as heir-looms, against *B.* and her daughters, who insisted that they vested in the eldest son, who was tenant in tail in possession under the settlement, and who dying intestate, they ought to be distributed.

The Lord Chancellor declared that the books, both in town and country mentioned in the will,

H h 4

were,

to the same thing as expressly limiting the said personal chattels to *A.* for life, remainder to

were, according to the events that had then happened, to be considered as part of the personal estate of the eldest son. 2 *Vez.* 122. 1 *Bro. Chan. Ca.* 281. in note.

And in the case of the Duke of *Marlborough* and *Spencer*, 5 *Bro. Ca. in Parl.* 592. which case arose on the following circumstances. By acts of parliament, the honor manor, and park of *Woodstock*, &c. and an annuity, out of the post office, were settled in John Duke of *Marlborough's* daughters, and their male issue in manner therein mentioned. And it was enacted, that neither the Duke, or his daughters, or the heirs male of their bodies, or any other person to whom the premises should come by virtue of the limitations aforesaid, should have any power, by fine, recovery, or any other act, to bar any person, to whom the premises were thereby limited, from enjoying the same, according to the limitations before mentioned.

Afterwards the Duke made his will, and gave to the Dutchess his wife, during her life, the use and occupation of all his pictures, glasses, hangings, and beds, and all other the household goods, and furniture which should be in *Blenheim* house at the time of his decease, and of his gold plate, and, after her

to his first and other sons successively in tail-
male remainder to T. and thereupon it was in-
fisted,

(415)

her decease, he gave the use and occupation thereof to the countess G. for her life, and after her decease to Lord R. for his life. And it being his desire (as he thereby declared) that the same might *always* be enjoyed with *Blenheim* house, by the owner thereof, being Duke or Dutchess of *Marlborough*, according to the settlement of the said house, by act of parliament, he annexed the glasses and marbles fixed in the said house, to the same; and declared them to be taken as part of, and enjoyed therewith, and all other the said goods and furniture, so far as by law the same might be annexed thereto. And the Duke bequeathed the use of his diamond sword, his Georges and collar, upon trust for such person and persons, and for such time, and in such manner, as he had before given the said household goods, and furniture, that should be at his decease at *Blenheim* house. Afterwards several of the tenants for life to whose issue the premises were limited in tail, died without issue, and *George* Duke of *Marlborough*, (who was not born until after the will, and death of the testator, and who upon his birth, became intitled to a remainder in tail male in all the real estates of which the testator died seised,) exhibited a bill in chancery praying among other things, that the goods at *Blenheim* house, the diamond sword, Georges and collar, and

sisted, that the limitation of *T.* was void after an express limitation in tail to the sons of *A.*
 Lord

and other specific things, being in their nature chattels personal only, and incapable of a limitation over, might be delivered to him. And it was determined by Lord Chancellor *Northington*, that they were become the absolute property of the Duke.

And the same doctrine prevailed in the case of *Foley and Burnell*, stated *supra* 39, 42. For it eventually turned out in that case, that *E.* had a son born, who died soon after (in fourteen days) and it was decreed by Lord *Thurlow* Chancellor, that the whole interest in the chattels vested in that child, and on his death in *E.* as his administrator; and on a rehearing his Lordship's decree was affirmed by the Lords Commissioners, and their decree again affirmed on appeal to the House of Lords.

But although where real or personal chattels are included in the same limitation as freeholds in strict settlement, or where such chattels are limited by reference to a limitation of freeholds in strict settlement, the chattels vest absolutely in the first tenant in tail, who comes *in esse*; the vesting may be postponed by a specific limitation, to a more remote period.

Thus

Lord *Hardwicke*, without delivering a decisive opinion upon the point, declared, that in the reason

And vide 2
Vez. 122.

Thus in the case of the Duke of *Bridgwater* vers. *Egerton*, stated *supra*, 470. it was held that the first son dying under the age of twenty-one years, and unmarried, the second son, having become eldest, for the time being, would, when he should attain his age of twenty-one years, or be married, and on giving notice of his desire for that purpose, pursuant to the will of his father, be intitled to the testator's houses, coach-houses, and stables, with the appurtenances in *E.* and also to the pictures, household goods, and furniture in the said houses, and the testator's plate mentioned in his will.

And as the preservation of personal property, for the benefit of those who are intitled to real property, depends merely upon suspending its vesting until the *event* on which it is intended to pass, and as such suspension may be extended to any period not exceeding twenty-one years, after a life or lives in being, the settlor of such property may continue the suspense, till twenty-one years after the death of the survivor of all the tenants for life; but in such case no person would be entitled to take it, until *that* event, which would not answer the purpose, where the object was a concomitancy of estates; because the first tenant in tail in the limitation of the real estate, on attaining the age of twenty-one, might

reason of the thing there seemed to him to be a great difference between such sort of limitations

bar the limitations over in such estate by recovery, which would produce a separation ; but this may be prevented by continuing the suspense to that period, in case no tenant in tail, intitled for the time being to the personal property, shall have attained the age of twenty-one years, and barred the estate-tail in the freehold by recovery : Which mode seems to be carrying a trust for preserving and continuing personal property for the benefit of persons, intitled in the mean time to freehold property, to the utmost possible limits.

In the above case of *Gower and Grosvenor*, Lord *Hardwicke* appears to have treated the words “ *as much as they can by law*” where used in such cases, as giving an opening to the *modification* of such a limitation by a *court of equity* ; for his Lordship said, those words evidently shewed, that there was a *future act to be done* in that case, and that the Court was to direct a limitation [*settlement*] of these chattels to be made “ *as far as it could by law,*” so that this clause was to be considered only as *executory*, and *directory* to that which the Court was to do, and, consequently, a greater latitude was to be allowed, as that was the case, than would be if no conveyance was to be directed by the Court. He observed, that though the party only said “ *as much as by law they may*”

tations *vested*, and the like limitations when *contingent*; as if a personal estate be bequeathed

may" yet that was the same thing as if he had said "by law or *equity*" and that gave the Court jurisdiction to direct a conveyance to be made; and as the party had declared, that he had designed those personal chattels should go with his real estate, *as much as they could by law*, it remained to consider how far this could be by law; and thus much was plain, he might have limited them to *A.* for life, the remainder to his first son and the heirs male of his body, and if such son died before the age of twenty-one, and without issue male, the remainder over to his second son; he might have made the same limitation over to all the other sons; and in default of such issue, he might have limited the remainder over; and in case no son had lived to attain the age of twenty-one, the remainder would have been clearly good. This was the common and known way of conveyancing in settling of chattels; and that where things were directed by will to go as heirs looms with an estate, or in case of a marriage settlement or the like, so far as they could by law or equity, it was very proper that *it should be left to the Court to settle the conveyance*, and where it was left to the Court to do the act, they had made as *material alterations* in the instrument, as would be necessary in the present case, they having inserted a clause for limiting

ed to *A.* for life, the remainder to *B.* and the heirs-male of his body (supposing *B.* a person
in

limiting an estate to trustees to preserve contingent remainders.

And in the case of *Trafford v. Trafford*, 3 *Atk.* 347. Lord *Hardwicke* recognized and confirmed his former opinion on this subject.

But we may observe that these words so far "as they can by law" do not necessarily import a desire that the chattels should be preserved in the line of succession, as long as the same might be effected by any limitation that the ingenuity of conveyancers might contrive, for these words will bear several other interpretations. They may be explained by the different natures of real and personal property, which occasion a different effect to follow on similar limitations. Or they may be understood literally, as directing that the legatee shall take, as heir looms, the same estate in the leasehold or personal chattels *as near as the law will permit*, as he takes in the freehold. Now the law, under a similar limitation of chattels, unconnected with freeholds, as is applied to the freehold in strict settlement, would give an estate tail, and it is an incident appertaining to an estate tail in leaseholds, that the donee takes an absolute property, which is therefore the nearest estate in leaseholds, similar in extent to an estate tail in freeholds, that the law allows to take effect in
personal

in esse) remainder to C. the whole remainder in that case is vested in B., and C. can never under

personal property. And if any other construction were permitted, the direction of the testator would be abandoned in favour of a supposed intention which he has not expressed; for if we were in such case to restrain the estate from vesting until twenty-one, and confine it by executory limitations, to be *concomitant* with the freehold, as far as possible by law, it would be deviating from the similarity of estates given to the same person in both the species of property, by making the one contingent, executory and defeazable, when the other was vested and absolute.

Besides, it may be observed, that although in such cases the personal estate devolves by law on the executors, in the first instance, no instrument or conveyance is necessary to direct the execution thereof, and transfer it to the legatee. All the interest in such case accrues to the legatee by the devise, and is *executed* by the assent of the executor; therefore there seems to be nothing executory in such a disposition, and consequently no room for the application of the principles on which courts of equity rely in modifying trusts.

And the rule as to the construction of such dispositions of personal property, by reference to the limitations of real property, seems to be now settled in

under that limitation come in for any part of it; but if the first remainder were *contingent* in

in regard to cases where the testator or settlor has himself *finally* declared the trusts, with no other reference for their operation than to the rules of law, in a modern case of *Vaughan v. Burstem*, 3 Bro. Chan. Ca. 101.

In this case one devised his manors, &c. to trustees, to uses, under which his wife was to receive an annuity, and to pay other annuities, remainder to the use of the first son of the testator's body in tail, remainder to the second and other sons of his body, which uses never took effect, remainder to the use of his daughter *A.* for life, remainder to trustees to preserve Contingent Remainders, remainder to her first and other sons in tail, remainder to *B.* with other remainders over, he then gave the use of his pictures to his wife for life, and directed that she should have the use of his plate, until a son of his body should attain twenty-one, or until his daughter *B.* should attain twenty-one, or be married, which should first happen, and then desired such son or his daughter should have the use of his plate, and directed further, that all his plate, household goods, furniture, glasses, and china, which should be in his house at *H.* should go as heir looms, with his real estate and be held and enjoyed by the person or persons, that should for the time being, by virtue of his will, be entitled to his said real estate, as far as the rules of law and equity

in its creation, then the remainder over to C. would be good or bad, according to the event of

equity will permit. A. married C. and had a son born who lived six weeks, and who was tenant in tail in remainder under the will. And after his death those in remainder filed a bill against A. and C. praying an inventory for them. *Et per Chan.* I am called upon to say that the effect of the will is to prevent the use from springing, where if it sprung it would give an absolute estate. To do this, I must determine, that the use shall not spring or vest till twenty-two years after the death of A. the first taker for life. How am I to gather this? from the words "as far as the rules of law and equity will permit." This cannot be; the uses could not go further than the law will permit. But these words have their sense; for he seems to have known that the personal property could not go so far as the real. Here the "*person entitled*" seems by express description to be the child of C. It would be pedantic to say that *Gower* and *Grosvenor*, turns on the words "*as far as the law allows*" for they are explained by the different natures of real and personal estates. To do what is called for in this case, I must go much further than ever has been done; for I know no instance where the conveyance has been carried to the utmost extent of what the law might do. He certainly meant the son, if he was in possession should have them. What then, shall they not be

of the contingency; that is, if a limitation which would have been a contingent remainder

in possession, in the mean time, not vest in any body? Cases which say you shall do all this for the testator, by saying you shall do all that can be done, will not do. This would be fetching the intent of a testator, in a way many cases have said, it cannot be done. The property cannot be rendered inalienable, but by preventing the use from springing, which cannot be when a person is born who would take absolutely. It would be a direction to keep it unalienable as long as could possibly be. I am of opinion that *the words are not sufficient to give such a construction*, and that consequently I must declare this property vested in the son of A. and that it goes to his father as his representative.

But although this may now be considered as the settled rule in cases of the nature of those last mentioned, I am not aware of the rule having been ever extended, to cases where the trusts have not been *finally declared* by the settler himself, but only generally expressed by way of *direction*, or *agreement*, for a *future settlement*, to be framed for that purpose, and which of course would be subject to the *modification of equity*, for effectuating the apparent object of them to the extent usual, in settlements for similar ends. I know of no case of this sort which has occurred before a court of judicature, but several instances of this nature, came under the consideration

der in case of a real estate, should become vested during the life of any of the tenants for

tion of Mr. *Fearne*, in the course of his practice. And he thought a material distinction arose from that circumstance.

One instance of this kind occurred where freehold estates were by articles agreed to be strictly limited, and in which there was a covenant that the settlor would assign leasehold estates, to trustees, in trust "for the benefit of such person and persons, and for such or the like estates, and for such or the like ends, intents and purposes as were therein before mentioned of or concerning the said hereditaments, and premises therein before limited, and appointed and granted and released as aforesaid "as far as the law in that case will allow or permit."

in my mss. note in Holey v. Knorr, 1 Bro. Cha. Cas. 27. The instance here referred to being probably the very case of a Mr. Hill, to which my mss. note refers.

This Mr. *Fearne* said was the case of a trust executory, and not executed or terminating in the words, or literal operation of the instrument, or will itself, but left to be accomplished and perfected by a future deed, and where of consequence the whole direction of such settlement fell upon the Court, who were to direct how the parties were to convey; according to the well known distinction in the case of *Stamford v. Sir John Hobart*, and the several authorities referred to in the present edition of *Contingent Remainders*, fol. 207. *et seq.* This too was the case

for life, or if a posthumous child should be born who would have had the benefit of the remainder,

of *marriage articles* in the *execution of which*, equity regularly introduced such clauses, &c. as were requisite for effectuating the intended provision for the issue of the marriage, which provision might eventually be defeated, by permitting the whole interest to vest absolutely and ultimately in a first son-dying an infant. In the decreeing an execution of marriage articles, a court of equity regarded the end of the settlement, beyond the legal operation of the words in which the articles were expressed, and therefore frequently varied from the legal import of those words, as in the case of limitations to the heirs of the body, &c. or such court supplies or transposes estates, as in the instance of estates to support contingent remainders, &c. to substantiate the intended provisions; and accordingly (he said) we find Lord Hardwicke in the case of *Gower and Grosvenor*, observing, "that in cases of marriage settlements, or the like, under the words "*so far as they could by law or equity*" it was very proper that it should be left to the Court to settle the conveyance; and where it was left to the Court to do the act, they had made as material alterations in the instrument, as would be done in that case." And Mr. Fearne said, he apprehended, that in cases of personal estates the introduction of a clause to carry the fund over, on a tenant in tail dying under twenty-one without issue, &c. could not be

remainder, if it had been within the statute of W. III. then the remainder over would be bad

be deemed any greater liberty, than that of introducing an estate to trustees to support remainders in a settlement of freeholds; both were directed to the preservation of the interests intended for those in remainder; the one operated to intercept that power, which the law would otherwise leave in a preceding tenant, of disappointing the limitations to those in remainder; the other, to determine that interest of a preceding tenant, which the law would otherwise give him to the exclusion of those in remainder, in an event, where such a consequence was evidently contrary to the general view of the settlement. And therefore, if we attentively considered the words of the original trust, the introduction of such a shifting clause would not appear at all irreconcilable with them. The words for the "*benefit of*" such person and persons, and for such estate and estates, &c. and for such and the like ends intents and purposes, as far as the law in that case would admit, surely imported a settlement that would as far as might be, secure the property to the same persons in succession; so far as it fell short of that, it failed of enuring to the *benefit of such person and persons*. Such or the like estate and estates imported *estates or interests*, as near as might be corresponding in *duration of interest*, and *power of disposition*. An absolute estate in personals, and which would be

liable to the testamentary disposition of an infant, did not at all correspond in those respects, with an estate-tail in the infant, which would determine on the decease of the infant tenant in tail, without issue, which will not be liable to his testamentary disposition. Such an interest in personals as would determine on his death without issue under age, and would not be liable to his disposition before he attained his age, seemed much more analogous to his estate in freeholds in both these respects. And the import of the words, "for such and the like ends intents, and purposes," seemed much better answered by the introduction of a clause, which would extend the purposes of a provision to children, &c. in remainder, when it became useless in respect to a *first son*, by his never living to call for it, than by carrying such intended provision through him to his parent, or personal representatives, for whom it never was intended, in exclusion of every child for whom it was intended. A clause therefore that would carry the interest in the leaseholds over, upon the death of any child of the marriage, under twenty-one without issue, inheritable to the intail, so far from being objectionable, on account of any inconsistency with the express words of the trust, seemed to him to be rather *auxiliary to their compleat effect*. But at all events he (Mr. *Faarne*) thought we must admit such a clause to be material, for preventing the disappointment of the provision, manifestly intended for a second or younger child, in case of the death of a prior child in its infancy, and before it could have any call for the provision intended. And on this ground he thought, that in the execution of
of

of marriage articles, such as in the present case, a court of equity would supply it; and as to any objection to be raised by the question, how far was the court to go in this sort of aid? Why stop at all short of the utmost extent of what the law *might do*? And how was it to decide, or why take upon itself the decision of those limits? He was of opinion it would be sufficient to recur to Lord *Hardwicke's* observations in *Gower v. Grosvenor*, who in speaking as to that power said, "that it is extremely plain, the testator might have limited to one for life remainder to his first son, and the heirs males of his body, and if such son died before the age of twenty-one and without issue, then to the second son, with the like sort of limitation over to all the other sons; and in default of such issue remainder over. That he said was *the common and known way of conveyancing*. And in such sort of cases, the Court (Lord *Hardwicke* said) must take notice of it as part of *the law*. And he referred to cases in which the validity of such limitations had been established. Such seemed to be the *extent* of equitable construction, *requisite* to answer the *general object* of the intended provision, for *the issue of the marriage* to a *similar degree* in both species of property. And it being consistent with the usual *course of settlements of such sort of property*, founded on decisions *expressly* going the *very length*, and thus judicially considered by Lord *Hardwicke*, a clear plain rule for the adoption of a court of equity, in such cases; where could be the obstacle to the court proceeding to limits thus clearly established, and approved of, without en-

bad in event; but if no such contingency should happen then it would be good. (a)

So

tering into the question, how far the ingenuity of conveyancing might carry the experiment of suspending the period of *absolute vesting*, or the power of alienation for purposes not essential to the *substantial end* of the provision, intended by the settlement for the children of the marriage.

(a) So in the case of *Pleydell v. Pleydell*, 1 P. Will. 748. where J. P. having no issue by the plaintiff E. his wife, but having two brothers R. P. and C. P. devised all his money and securities for money to his brothers in trust to pay 200 l. to his wife absolutely, and to pay the interest of all the rest of his money to his wife, for her life, after her death he gave the interest of 400 l. part of the residue to his brother R. P. for his life, then to his *first son*, payable to him until he should attain his age of twenty-one, at which time he was to be paid the principal sum of 400 l. But if such eldest son should die before his age of twenty-one, then the testator decreed the interest of the said 400 l. to the second son of the said R. P. until his age of twenty-one. And then to pay him the principal sum and in case of his death before twenty one to the third, fourth, &c. sons of the said R. P. in like manner. He also gave the interest of another sum of 400 l. to his said other brother C. P. for his life, and after his death

So in the case of *Green v. Ekins*, where there was a bequest of personal estate to the first

Green v. Ekins, 3 P. W. 389.

death the interest to go to his first son, until his age of twenty one, when the principal sum was to be paid him; but if it should happen that his first son should die before his age of 21, then the interest to be paid to the second son of C. P. until his age of twenty one, at which time the principal sum of 400 l. was to be paid to such second son; but if he should die before twenty-one, to the third son. After which came a clause "that if either of the said testator's brothers R. P. or C. P. should die without issue in such case his share was to go to the testator's right heirs." And he made his wife executrix and residuary legatee.

As this case is reported in *Peer Williams*, the Lord Chancellor is said to have decided in favour of the devisee over in default of issue, on the ground, that there is a distinction between the words "die without issue" as applied to chattels real and chattels personal. And that in the latter case it is to be understood as death without issue then living. But we have seen that distinction does not hold.

But in the addenda to the 3d vol. of *Peer Will.* by Mr. Cox, it is said that in *Shepherd v. Lessingham*, 29th October 1751, Lord Hardwicke observed that in *Pleydell v. Pleydell*, the former limitations being to sons, the dying without "issue" must mean
"such

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first son of the testator's daughter who should attain 21, and in case she should have no son who should attain that age, then to J. S. the limitation over to J. S. was held good upon that event.

3 Atk. 287.

And vide the cases of *Pinbury v. Elkins*, and *Maddox v. Staines*, and *Sabbarton v. Sabbarton*, before cited.

And in the case of *Sheffield v. Lord Orrery*, above cited, Lord *Hardwicke* said, it was clear and certain, that no limitation of a personal thing can be admitted after a dying without issue generally, but if this is confined to a life or lives in being, or within 10 months, or the birth of a child, or in case of the death

“such issue” viz. “sons” and that case did not therefore turn on any general doctrine, that the construction of “dying without issue” was different in limitations of personal estate and real.

If so then the limitation over in default of issue, to the testator's right heirs, must have been good, in the event of *R. P.* and *C. P.* dying without issue living at their death, on the ground *Mr. Fearne* is here discussing, viz. that the preceding executory limitation to the sons, which would have carried the whole interest, did not vest.

And see the before mentioned case of the Duke of *Marlborough* vers. *Spencer*, which is another instance of the application of the same principle.

of

of such child before the age of 21, or if limited on a contingency to a person who never takes, the limitation is good.

In the foregoing cases we are to observe, that wherever a preceding executory limitation carried the whole interest, a subsequent limitation was not considered as a limitation upon the preceding, and to take effect after it, but only as an alternative substituted in its room, and to take effect only in case the preceding should fail and never take effect at all; and where a preceding executory limitation did not carry the whole interest, a subsequent one was considered, either as becoming vested in interest as a remainder expectant on the preceding estate, as soon as that took effect, or else as taking effect in possession at the time limited for the preceding estate to vest, in case that preceding one failed of taking effect; so that in either case it follows, that if the preceding limitation was not too remote in its creation, the subsequent one could not be so, being to take effect at the time limited for the first, or else not at all.

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And therefore we must be careful to distinguish between instances of this kind,
and

and those cases wherein, either the preceding limitation is not *executory* but *vested*, or there is no preceding limitation at all; for in either of such cases the future limitation cannot be merely an *alternative*, but is absolutely limited to take effect either after the expiration of the preceding limitation, or else (if there be no preceding limitation) upon the happening of some future event. And therefore if the expiration of that preceding limitation, or if that future event be of too remote a nature, the future limitation is void in its creation, and no subsequent accident can make it good; because it is not (as in the former cases) limited to take effect or to fail upon the event of a contingency, which must be determined one way or other within the period allowed by law for the vesting of an *executory* devise; but is limited absolutely to take effect on an event which may not happen within such a period.

Vide Caf.
Temp. Talb.
245. Sabar-
ton v. Sabar-
ton, *supra*,
p. 321.

Thus, altho' in the case of a devise of lands in fee to the first son of *A.* who shall attain 21 years of age, and in default of such issue remainder to *B.* in fee; such a limitation would fail, or take effect according as the first limitation should vest or not; yet if a devise be to the *heirs-male* of the body of *C.* and in default of

of such issue remainder to *D.* in tail; here if we suppose the first limitation void, the subsequent one is an absolute future limitation to take effect after a dying without issue; and therefore though no heirs-male of the body of *C.* should ever exist, such event will not make good the limitation to *D.* which was too remote in its creation, and could not be considered (as in the former case) merely as an *alternative* to a preceding limitation, and which must vest at the time limited for that preceding one to vest, or else not at all. (a)

Vide 2 Burrow 878.

I have

(a) Mr. Douglas in a note on the case of *Doe v. Fonereau*, Dougl. Rep. 487, puts a proposition which seems to contradict what is here said by Mr. Fearn, for the reporter observes "that a devise after a failure of the issue or the heirs of *A.* without any previous estate to such issue or heirs, is void in its creation, whether it be of real or personal property. Such a devise, with a previous contingent limitation, to the issue or heirs of *A.* is not void in its creation." And he relies upon the principles laid down by Lord Mansfield in the principal case as supporting the proposition. But it is to be observed, that Lord Mansfield's observation, as to the case of *Doe v. Fonereau* falling within that class of cases where the remainder over is good, on the ground of the limitation, implying a double contingency, viz. to the heirs male of the body of the eldest son, if there should

I have before shewn that whenever a contingent limitation is preceded by a freehold capable

should be any, and in default of such issue, to the second and other sons, is founded on the ground that the first limitation in that case "to the heirs male of the body of T." was a good and valid devise, which depended upon a doctrine treated upon by Mr. *Fearne* in a subsequent part of this Essay 425—431, as to executory limitations to persons not *in esse*, *per verba de presenti* or *per verba de futuro*: for there is a distinction between executory limitations *per verba de presenti* and *per verba de futuro*, and in some instances of the former description the limitations are void; in such cases the subsequent limitations will fail within the principle above stated by Mr. *Fearne*, and will not be helped by the doctrine resulting from the case of *Doe v. Fonereau*. And it seems to me, that Mr. *Douglas* is led into the general conclusion above stated, as to the effect of the principles which governed the judgement in the case of *Doe v. Fonereau*, by a misconception of the sense in which the terms a double contingency is there used by Lord *Mansfield*, for Mr. *Douglas*, in the same note, *Ibid.* 504. 2. observes that "a double contingency in the sense in which the expression was used in this case, is where an estate in trust, or by way of executory devise, is so limited, that the time when it is to vest in possession, will, on one event, fall within the limits allowed by the law, and on another,

capable of supporting it, it is construed a contingent remainder, and not an executory de-

another, will exceed them," now it strikes me, that Lord *Mansfield* intended to use the term "double contingency" exactly in the reverse of the sense attributed to it by this Gentleman, for I apprehend that "a double contingency" as the terms are used in this case by Lord *Mansfield*, is where an executory devise is so limited, that the time when it is to vest in possession, will on either of several events, fall within the limits allowed by law, and will in no event exceed them. Thus Lord *Mansfield* says, in the case of which we are now speaking "What are the limitations here? they are to the heirs male of the body of T. and in default of such issue, to the second and other sons. There are two ways in form of law in which this last limitation may take effect; 1st. If T. dies leaving issue male, then the estate to the second son takes effect immediately, as a remainder expectant, which may be barred by a recovery. 2dly, Suppose the other alternative, (which really happened) that T. had no son, then it is an executory devise to the second son, if T. at his death, leave no issue male". Therefore according to Lord *Mansfield's* reasoning, a limitation with a double contingency, is where the time when the limitation is to vest in possession, must in either event fall within the limits allowed by law. See Mr. *Fearne's* observations on the case of *Loddington v. Kime*, *supra* vol. 1. 293.

vise;

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vise; but it is possible that the freehold so limited, may by a subsequent accident become incapable of ever taking effect at all, (as by the death of the first devisee in the testator's life-time), in which case the subsequent limitation, if the contingency has not then happened, will be in the same condition at the testator's death (that is at the time when the will is to take effect) as if it had been limited without any preceding freehold; now in this case it has been held, that where such subsequent limitation could not vest at the testator's death, it should enure as an executory devise, rather than fail for want of that preceding freehold which had never taken effect.

Hopkins v.
Hopkins, supra, p. 231.

Thus in a case above cited, where *A.* devised lands to trustees in trust for *B.* for life, and after his decease for the first and other sons of *B.* successively in tail-male, remainder to the future sons of *C.* for life successively, with divers mean remainders, remainder over to *D.*; *B.* died without issue in the life-time of the testator, and afterwards the testator died before any of the contingent remainders were vested; the question was, Whether the mean Contingent Remainders were not become void, there being no preceding

ing estate to support them? For if so, then would the whole have been vested in possession in *D.*; and it was held they should enure by way of executory devise.—And in this case a son being afterwards born to *C.* it was held that the executory devise having thereby once vested, the subsequent limitations thereupon, became Contingent Remainders; and though such son afterwards died before the subsequent limitations vested, yet were they not destroyed; because it was held, that the inheritance vested in the trustees, was as sufficient to support them, as if there had been estates limited for that particular purpose.

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1 Vez. 268.
Hopkins v.
Hopkins,
1 Atk. 581.

The like observation may be made in regard to the case of *Stephens v. Stephens*, before cited; that until the estate became vested in some son of *T. S.* and *M. S.* who attained 21, the limitations over to the daughter and to Sir *R. S.* must have been executory devises; but as soon as ever, the estate should become vested in a son, then those subsequent limitations must of course take effect as vested remainders upon the preceding estate-tail in such son.

Supra, p.
411.

Vide supra,
P. 394. 395.

And so in the case of *Brownsword v. Edwards*, Lord *Hardwicke* held, that the limita-

Vide supra,
P. 397.
Vide 2 Vez.
249.

tion over would enure by way of *executory devise* if *B.* died without issue under 21; and that if he died without issue after 21, when the estate had vested in him, then the limitation over would go by way of *remainder*.

Vide Carth.
310. Reeve
v. Long, 2
Saund. 380.
2 Vez 616.

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But when a preceding freehold has once vested, it seems no subsequent accident will make a *Contingent Remainder* enure as an *executory devise*. This is a direct consequence of the rule above treated of, that wherever a devise may be construed a *Contingent Remainder*, it shall never be considered as an *executory devise*.

Supra, p. 180.

and v. Plowd.
156. b.

Gulliver v.
Shuckburgh
Ashby, supra
p. 311. and
vide 4 Bur-
row 1941,
& seq.

I have had occasion to notice in the case of *Jermyn v. Arscot* cited in a former page, that a condition or provisoe to determine an estate-tail as to a particular person only, was held to be void; upon the principle, that estates in land cannot be determined *in part* only, and continue as to the residue, or vest and then cease, and again re-vest. The opinion held in that case appears to have been cited and assented to, as an authority in point, by the Judges of the Court of King's Bench, in the above cited case of *Gulliver v. Shuckburgh Ashby*.

And

And upon the same principle, it was said by *Walmesley J.* in *Corbet's* case above cited, if a man make a feoffment in fee, upon condition that if the feoffee die his heir being under age, that his estate should cease during the minority of the heir, that such a condition is utterly void. And so in the case of a feoffment to the use of *A.* and his heirs every *Monday*, and of *B.* and his heirs every *Tuesday*, &c. that these limitations were void, for that the law knows no such fractions of estates. And that in case of a partition between coparceners, that one should have the land from *Easter* to 1st of *August*, and the other from 1st of *August* to *Easter* in *severalty*, it was good only in respect to the possession and taking the profits, but no * *severance* of the estate of inheritance; any more than a partition to present by turns, which was only a partition as to the possession, and they should notwithstanding join in a writ of right. (A)

Supra 179.

1 Rep. 87.

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* But v. 1
Inst. 4. a
where Lord
Coke says
they have several inheritances.

Brook Judgment, pl. 41.

However it appears, that a distinction has been taken in this respect, between lands and

(A) But now by statute 7 *Anne*, c. 18. where coparceners tenants in common or joint-tenants make partition to present by turns; each shall be seised of his or her separate part of the advowson, and to present in his or her turn.

K k 2

a rent

1 Rep. 87.

a rent newly created ; for we find a case where rent was granted with condition, that *when any heir of the grantee was within age, the rent should cease during his nonage*, and the feme of the grantee recovered dower during the nonage, with *cesset executio till the full age of the heir*. In this case Lord Coke observes, that the writ of dower was brought against the *ter-tenant*, which, he conceived proved, that, for the time, the rent newly created should cease *per modum concessionis* ; and indeed the suspending the execution till the heir should come of age, seems to prove this.

(423)

Ibid.

And vide
Plowd. 156.
b.

This case of the rent, *Walmesley* observed, was not against his opinion in respect to the land ; for he said, it was good as parcel of the quality of the new thing ; and he put a case of a common newly created, and agreed that such quality might belong to rents and commons newly created, as being *modus donationis*. But that it was otherwise in regard to estates in land ; for if they should so cease, vest and re-vest, it would be dangerous to the *præcipe* of a stranger ; which inconvenience does not extend to the case of a rent or common newly created. And *Glanville* agreed with him, that a rent newly created might be made to cease in that manner, but land not.

Indeed

Indeed in a case where a rent-charge in fee was granted, and a fine was levied of the lands to the use intent and purpose, that if the rent should be behind, and no sufficient distress be found upon the premises, or any rescous, &c. should be made, that then the grantee his heirs or assigns might enter, till the rent and all arrears thereof should be paid and satisfied; this was held to be no condition, but a limitation of the use; and this contingent and future use to arise upon non-payment of the rent, was held not only to be good and effectual, but also to be transferrable and capable of being assigned with the rent; that it being a matter of inheritance, and for securing the payment of the rent, and waiting upon the rent, it might well be transferred with the rent; but that if it had been a mere possibility, or contingent estate not coupled with any other estate, it had not passed or been transferrable.

Haverhill
v. Hare, Cro.
Jac. 510. 1
Roll. Abr.
Grants (N)
pl. 3.

(424)

So it seems that a rent *de novo* may be granted to commence *in futuro*, though a freehold in land may not, any more than in a rent *in esse*. And the same observation may be extended to grants, by the King, of offices not previously subsisting in fee. And something of the like nature may be noticed

Brook
Grant 86.
Plowd. 156.
b. 2 Ventr.
204. 1 Lev.
144. Salk.
577. Moor,
pl. 100.
Shower Rep.
300.

1 Ld. Raym. in regard to grants of dignities *in remainder*
 52. as it is called, which, it seems, operate in fact
 Shower Cas. as new grants.
 in Parl. 11.

Lade v. Hol-
 ford, 3 Bur.
 1416.

Here we are also to notice another late case, which seems to fall within the above-mentioned rule, that estates shall not cease as to part, and vest and re-vest; and which nearly resembles the case of the feoffment put by J. *Walmesley*, first above cited. It was where a testator having devised lands to trustees and their heirs, in trust for J. in strict settlement, with divers remainders over in strict settlement, subjoined a proviso in the will, that so often as, and during such time as the person who for the time being (in case the testator had not otherwise directed) would have been intitled in possession as tenant for life or tenant in tail, should be under the age of 26 years, then the trustees were to enter and receive all the rents and profits of the lands; out of which they were to allow certain sums for the maintenance of such tenant for life or tenant in tail, and the rest was to accumulate to be laid out in the purchase of lands to be settled to the same uses.

(425)

J. died upwards of 26 years of age, leaving his wife *ensient* of a son; and, upon a case sent

sent from the court of Chancery to the court of King's Bench for their opinion, whether the trustees, upon the birth of the said son of J. took any and what estate in the lands, by virtue of the said proviso; they certified their opinion, that the trustees did not take any estate in the lands by virtue of the said proviso.

It has been held, that where an executory devise is limited, *per verba de presenti*, that is, where the devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period, there the devisee must be a person capable at the death of the deviser, or otherwise the devise will be void; as if one devise (immediately) to the heir of J. S. and J. S. is living at the death of the testator, it is said the devise shall not be construed an executory devise, and therefore must be void; but that, if it were to the heir of J. S. *after the death of J. S.* that would be clearly good as an executory devise, because a future time is mentioned.

1 Salk. 226.

So it has been said, that a devise to the first son of A. having none at that time, is void; but that if it were to the first son of A. *when*

Ibid. 229.

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Raym. 83.

he shall have one, it would be good: though *Bridgeman* Ch. J. said, that a devise to J. S. for 15 years, remainder to the *right heirs* of J. D. is not good, but that a devise to one for 15 years, remainder to the *first son* of J. D. is good; because the devisor takes notice that J. D. hath not a son, and intends a future act.

1 Lev. 135.
Snow v. Cut-
ler.

So it was formerly disputed, whether a devise to an infant *in ventre sa mere* was good, or not; some held that it was not, upon the principle I have been mentioning, whilst others contended that it was; but all agreed, that a devise to an infant *when he should be born* was good.

Goodright v.
Cornish,
1 Salk. 226.

However, I have not found any case determined upon this distinction between *verba de presenti* and *verba de futuro*. For in the two cases I have cited, the judgments did not rest upon that point. In the first the limitation was to A. for 50 years if he should so long live, remainder to the heirs-male of the body of A.; the court upon the distinction I have mentioned, seemed to incline to the opinion, that this devise to the heirs-male of the body of A. was not a good executory devise; but whatever it was in its creation

creation they held it became void in event, for *A.* died without issue; so that whether it was originally void, was no direct point of their decision; the like observation may be made with respect to the other case where a limitation was to trustees for 11 years, and then to the first son of *B.* (then unborn); it was there said upon the same principle, that this limitation should not enure as an executory devise to the first son of *B.* because limited *per verba de presenti*; but, however, since *B.* died without issue, it became void in event whatever it was in its creation, therefore I apprehend the judgment did not decide that point.

Vide *supra*,
P. 407.

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Scatterwood
v. Edge,
1 Salk. 229.

Indeed in the cases of *Moor v. Parker*, and of *Goodman v. Goodright* cited in a former page, the court seemed unwilling to admit the devises to the *issue* of the body of a man by a future wife, and to the *heirs of the body* of a woman by a future husband, to be good; or rather inclined to avoid the question whether they were so or not. But it is obvious, neither of those cases decided the point in question, as I have observed when I cited those cases: and indeed the doubt of the court respecting the validity of the limitations in those cases, would not be supported upon the distinction

Vid. *supra*
P. 324. 339.

(428)

tion I am now speaking of ; because a devise to the issue by a *future* wife or husband, as much implies the testator's knowledge that such issue does not yet exist, and is as strongly expressive of a future time, as the case put and admitted by the court (*Salk.* 226.) of a devise to the heirs of *J. S.* after the death of *J. S.*

And the like observation may be extended to the case of a devise to an infant *in ventre sa mere* ; there certainly can be no doubt that a devise to such infant, necessarily implies a future disposition to take effect at its birth, as much as if the words *when he shall be born* were added ; for surely we cannot imagine an intention, that the child should take the estate before it is born.

In the infancy of executory devises, before their limits were ascertained and established, and whilst they were scarcely yet distinguished from limitations in conveyances at common law, there is no wonder that a distinction of this nature should have been taken ; and that it should have prevailed to a kind of *rigid* absurdity, in order to guard against and prevent too great a freedom and latitude, in what was then esteemed an innovation

vation upon the old common law; (A) but even then it seems to have been grounded upon some *supposed*, or upon the want of some *required* evidence of the testator's intention; as appears in the several cases put

(429)

(A) General restrictions in these matters, if universally adhered to with literal strictness, will necessarily involve some apparent absurdities, when applied to the circumstances of certain particular cases. But to leave it in the breast of the judge to relax or supersede general restrictions and rules, whenever he shall think particular cases not within the reason of them, may perhaps, by some, be thought a more important absurdity, and a matter of greater mischief in its tendency and consequences than that which is intended to be obviated by it; for this is in fact making the DISCRETION of the judge the only law in such cases. An error which our forefathers seem to have been even *illiberally* studious to keep clear of. For their creed seems to have been, what I have read expressed, in so much energy of terms, by a great judge even of these times. THE DISCRETION OF A JUDGE IS THE LAW OF TYRANTS; IT IS ALWAYS UNKNOWN; IT IS DIFFERENT IN DIFFERENT MEN; IT IS CASUAL AND DEPENDS UPON CONSTITUTION, TEMPER AND PASSION. IN THE BEST IT IS OFTENTIMES CAPRICE; IN THE WORST IT IS EVERY VICE, FOLLY AND PASSION TO WHICH HUMAN NATURE IS LIABLE.

Vide Lord Camden's argument in the case of Doe v. Kersey, Pasch. 5 Geo. 3. 1765. C. P.

by

by the court in the places above cited, from *Salkeld* and *Raymond*.

1 Freem. 244.
293.

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Gulliver v.
Wickett,
1 Will. 106.
supra p. 402.

But at this day it is clearly agreed, that a devise to an infant in *ventre sa mere* is good, though he be born after the testator's death, and he shall take by way of executory devise. *Per North* Ch. J. So in the case of *Gulliver v. Wickett* above cited, the court held, that the limitation to the child of which the wife was supposed *enseint*, was a good contingent remainder (the wife taking a preceding estate for life) to a supposed child in *ventre sa mere*; and that if there had been *no devise to the wife for life*, the devise to the child for life, being *in futuro*, (by which I conceive must be meant being in its own nature future) would have been a good executory devise.

Cas. Temp.
Talb. 145,
150. *Chap-*
man v. Blif-
set, *supra* p.
230.

1 Will. 225.
Doe v. Carle-
ton.

And indeed in the case of a future limitation to the unborn children of the testator's grandson, Lord *Talbot* thought its being limited *per verba de presenti* no objection to its taking effect as an executory devise, where the intention was clearly future. So where a testator devised to his wife for 3 years, remainder to his son for 99 years, if he should so long live, remainder to him for 99 years, if

if such wife as he should marry should so long live, remainder to the *beirs* of his son's body, and their heirs of their bodies; the court held the devise to the *beirs* of the son's body good, as an executory devise, being to take place *in futuro*, within the compass of a life in being.

Harris v.
Barnes.
4 Bur. 2157.

Again, where a testator devised his lands to C. for the term of 90 years from his (the testator's decease) if he should so long live, and after the determination of that term, he devised the lands to the *beirs of the body of the said C.* remainder over. Upon a question referred to the judges of K. B. whether the heirs of the body of C. took any and what estate under the will? they certified their opinion, that the clear manifest intent of the testator was to give an estate-tail to such person *as should be heir of the body of C. at his death*, (the only determination of the 90 years term in the testator's view) *to him and to the beirs of the body of the said C.* with remainder over as in the will; which intent of the testator might by law take effect as an executory devise, for the contingency must happen within the compass of a life in being; and the free-
hold

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hold in the mean time being undisposed of, descended to the heir at law (a).

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This inference at least, I think, may be fairly drawn from the last cited authorities; namely, that whatever force is to be allowed to the distinction between executory limitations *per verba de presenti* and *per verba de futuro*, it can only affect those cases, where there is not the least circumstance from which to collect the testator's contemplation or intention of any thing else, than, an immediate devise to take effect *in presenti*.

Cro. El. 878.
Pay's case.
supra 303.

It is a rule, that wherever there is an executory devise of a real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descend to the testator's heir at law. As where the testator devised lands to *A.* for five years from *Michaelmas* then next, remainder to *B.* in fee, and died before *Michaelmas*; it was held that the freehold and fee-simple descended to the heir at

(a) And vid. *Baldwin* vers. *Carver*, *supra* 216. and *Fonereau v. Fonereau*, *supra* 218. et *Nichol* vers. *Nichol*, *supra* 333. et *N.B.* the following lines of this paragraph, were expunged by Mr. *Fearne* in his copy.

law till *Michaelmas*. So where *A.* seised in fee, devises to *B.* in fee, to commence six months after *A.*'s death, during those six months the estate descends and continues in the heir at law. And where a testator seised in fee devised to trustees for 500 years, remainder to the first and other sons of *B.* in tail, (and *B.* had no son born at the testator's death) remainder over in fee; it was held, that the freehold descended to the heir at law till the birth of a son to *B.*, or till his death, without having had a son.

1 Lutw. 798.
Clerk v.
Smith.
supra 302.

2 P. W. 28.
Gore v.
Gore.

So where testator gave 550*l.* to his daughters, and devised his lands for a term of 99 years in trust, that in case his wife should, within four years pay off the 550*l.* then he gave the lands to his wife for life, and after her death to his son *H.* and his heirs-male and female, and for want of such issue, to him and his heirs for ever, and the same term to wait on the inheritance. The wife did not pay the money, and the estate was sold under a decree upon a bill filed against *H.*; afterwards a bill was filed against the devisee of the purchaser, by the son of *H.* as heir in tail, for the reversion expectant on the term of 99 years, there having been no fine levied to the purchaser

Hayward v.
Stillington.
1 Atk. 422.
(433)

by the son, to bar the estate-tail, and such purchaser having notice of the title.

Lord *Hardwicke* held, that this was a conditional limitation in the wife for life, taking place as an executory devise, (for that it could not be a contingent remainder for want of a freehold to support it) and that *H.* took an estate-tail with remainder to him in fee. And though in this case the estate for life in the wife was a preceding executory limitation which never took effect, because she did not pay the money and perform the condition on which it was to arise; yet the estate-tail to *H.* was well limited, and took effect expectant on the term of 99 years; and that this being an executory devise, the freehold descended to *H.* as heir at law to the testator, till the four years were elapsed or the wife had performed the condition. And his Lordship accordingly decreed in favour of the plaintiff's title to the inheritance.

Vide *supra*,
p. 163. & seq.
and 399 &
seq.

(434)

So where there is a preceding estate limited, with an executory devise over of the *real estate*, the intermediate profits, between the determination of the first estate and the vesting of the limitation over, will go to the heir at law, if not otherwise disposed of. As in the case
of

of *Hopkins v. Hopkins* above cited, where the testator devised lands in trust for *B.* for life, remainder in trust for his sons successively, remainder in trust for the future sons of *C.*, remainder over; and the testator provided for the disposition of the rents and profits during the minorities of those who were to take in future; *B.* died in the life-time of the testator, it was decreed the contingent limitations should enure as executory devises, and that the profits from the death of the testator till the birth of a son of *B.* should go to the heir at law; and afterwards a son being born to *B.* upon the death of that son it was decreed, that the rents and profits should belong to the heir, until some other person should become intitled under the limitations in the will.

Caf. Temp.
Talb. 44.
Hopkins v.
Hopkins.
Supra, p.
419.

1 Vezey 268.
1 Atk. 581.
Hopkins v.
Hopkins.

So where a testator devised his real and personal estate to trustees, and willed that the first son of *A.* when he should attain twenty-one, should have it and his heirs-male, and that he should be well educated; *A.* had no son at the testator's death. Lord *Hardwicke* held that the intermediate rents and profits of the real estate belonged to the testator's heir at law; but that the heir at law's interest would determine on the birth of *A.*'s son, be-

Bullock v.
Stones.
2 Vez. 521.

(435)

cause the education of that son was to be paid for by these rents and profits (a).

(a) And in the case of *Popham* vers. *Lady Aylesbury*, *Amb. Rep* 68. where one gave to his trustees all his freehold leasehold and personal estate whatsoever (except as therein mentioned) subject to his debts and legacies, to the use of them their heirs executors and administrators, in trust, if he should have one or more sons who should attain the age of twenty-one, for such son as should first attain that age, his heirs executors and administrators, respectively; and in case he should have no son, who should attain twenty-one, and that his nephew *T. B.* should live to attain that age, then in trust for his said nephew, his heirs executors and administrators, with, remainder over, with directions in the said will for maintenance. The testator died without a son. And one point submitted to the court was that the surplus profits of the estate after payment of the annuities left by the will, and the interest of the debts, were undisposed of until *T. B.* should attain twenty-one, and consequently the heir entitled to them. But the Court held this a compleat devise to the trustees, of the whole interest until *T. B.* should attain twenty-one, and that the surplus profits, after the legacies, &c. paid, and after what should be allowed for the maintenance of *T. B.* should be applied to sink the principal of the debts.

But

But a devise of all the *rest and residue* of the *real estate* will pass, as well the profits from the testator's death to the time of the estate's vesting, as from the determination of the first estate to the vesting of a subsequent one. As in the case of *Stephens v. Stephens* above cited, upon a devise to the testator's grandson *T.* in fee, and if he should die before the age of twenty-one, then to such other grandson then unborn as should attain the age of twenty-one, with mesne remainders, remainder over to Sir *R. S.* in fee; *T.* died under age, and it was decreed, by advice of the Judges, that the intermediate profits between the death of *T.* and the vesting of the estate by virtue of any of the subsequent limitations, passed to Sir *R. S.* by force of the *residuary devise*, as an interest in the *real estate* not otherwise disposed of. So where the testator devised all the *rest and residue of his real and personal estate* of what nature or kind soever, to such child or children as his daughter should have; it was held that the profits from the testator's death to the birth of a child of his daughter, should pass under this devise.

Caf. Temp.
Talb. 228.
Stephens v.
Stephens.
supra. 411.

1 Vez. 485,
Rogers v.
Gibson.
And vide
Duke of
Bridgwater
v. Egerton
infra 436.

So likewise in the case of an executory devise of a *personal estate*, the intermediate profits, as well before the estate is to vest, as be-

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Chapman v.
Blisset.
Cas. Temp.
Talb. 145.
Supra 230.
Vide also.
Rogers v.
Gibson. su
pra last cited
case.

tween the determination of the first estate and the vesting of a subsequent limitation, will pass by virtue of a residuary devise. As where the testator devised his estate real and *personal* upon trust, to pay his son *B.* a certain annuity, and gave all the *rest* and *residue* of the yearly rents of the *said trust-estate* to be applied during the life of his son *B.* to the education and *benefit* of the future children of his said son, and after *B.*'s death one moiety of the *said trust* to the said children, and the other moiety to somebody else; it was decreed, that the profits, from the testator's death to the birth of a child of *B.* should go entirely to *B.*'s children.

Duke of
Bridgewater
v. Egerton.
2 Vez. 122.

And where a testator gave a house with the appurtenances to his wife during her widowhood, then to his eldest son for the time being who should attain twenty one years of age, &c. The wife married again during the minority of the eldest son. There being a *residuary* disposition as well of the real as of the personal estate, Lord *Hardwicke* held, that as to the intervening profits between the determination of the wife's interest and the eldest son's attaining twenty one, so much of them as was *real* would fall into the *real residue*, and so much as was *personal* into the *personal residue*.

But

But where there is no residuary devise, or other particular disposition of them, it seems the profits of a personal estate between the death of the testator and the vesting of an executory estate, or between the determination of the first limitation and the vesting of a subsequent one, will accumulate for the benefit of the person next to take by virtue of the limitations.

(437)

Thus where a testator devised a share in the brewery to an infant, provided that infant should attain the age of twenty-one years, but if he should die before that age, then to *B.*: it was decreed, that the profits from the testator's death until the infant should attain the age of twenty-one, should belong to the infant on his attaining such age. The infant died before that age, and it was decreed, that the intermediate profits belonged to *B.* and not to the infant's administrator. So where a testator devised a personal estate to *M.* an infant, and if *M.* should die before twenty-one, and his mother should have no other child then to *W.*; *M.* died during his infancy, and it was decreed, that the rents and profits from the death of *M.* till the contingency should happen, were to accumulate and be added to the capital, and if *M.*'s mother

Barnardist.
Rep. in
Chan. 74.
Atkinson v.
Turner.

3 P. W. 300.
Studholme v.
Hodgson su-
pra. 410.

should have no other child, they should go to *W*.

Supra, p.
434

And so in the case of *Bullock v. Stones* above cited, Lord *Hardwicke* held that the personal estate passed by the will to the trustees; first indeed for the payment of debts; but that the whole surplus of it would belong to *A.*'s son upon his attaining twenty-one, and that in the mean time the profits thereof should accumulate (*a*).

But

(*a*) So where one devised the surplus of her personal estate to her niece, (being an infant of about seventeen) to be paid to her at her age of twenty-one years, and if she should die before twenty-one or marriage, then over, and she also devised a small estate in lands, to the niece in possession. It was held that the infant was intitled to the profits, and the interest of the surplus, which should incur from the death of the testatrix, and in the life-time of the niece, though she should happen to die before attaining her age of twenty-one, *Nicholls* *vers.* *Osborn*, 2 *P. Will.* 419.

And in the case of *Hawkins* *vers.* *Combe*, 3 *Bro. Chan. Ca.* 335. where one gave the residue of his personal estate by his will to trustees, to pay his legacies, and after payment thereof, as to two third parts thereof, for the benefit of two of his nieces
in

But here we are to attend to an observation that where an absolute property in lands is

(438)
Vide Boraf-
ton's case,
supra, p. 167.

in the manner therein mentioned, and as to the other third part in trust, to lay out and invest the same in securities; and from time to time, during the joint lives of his niece G. and of W. G. her husband or until some one of the children of his said niece should attain his or her age of twenty-one years, to lay out the interest, &c. in like manner to accumulate for the benefit of the issue of his said niece, or such other persons as were therein after mentioned; it being his intent that his said niece, during the life of her husband, or her husband should not receive or be benefited by any part of his estate, and in case she should survive her husband, and should have issue by him or any future husband, under twenty-one years of age, testator directed that the trustees should pay the interest, &c. to her or some other person, *to the maintenance and education of such children, until they should attain their respective ages of twenty-one years, and upon their respectively attaining their ages of twenty-one years, upon trust, to pay and transfer the funds, and all arrears, to all and every the children in equal shares and proportions; and if there should be one child only, to that one child at twenty-one years of age. And in case his said niece should survive her husband, and have no issue living by him, or having such issue, such issue should die under twenty-one years of age, then to pay the in-*

Taylor
v. Biddal.
Supra, p.
318. Mans-
field v. Du-
gard. 1 Eq.
Abr. 195. c.
4.

is given, and a particular interest in the mean time, until the devisee comes of age; the particular interest operates only as an exception out of the devise; which is so made *subject* to it; and such limitation is not considered as a condition precedent, to make the subsequent devise contingent, upon the event of such devisee's coming of age, and so make it an executory devise; but is only taken as a description of the time when the devisee is to have possession; and the estate vests in him immediately, subject to such particular interest. Thus in the case of *Goodtitle v. Whitby*

terest to *G. H.* for life, with remainders over. *G. H.* had two children *T. H.* a son and *M. H.* a daughter. *T. H.* attained his age of twenty-one in 1775, and *M. H.* her age of twenty-one in 1782. And the question was, whether the interest vested in such children as should be living, when the eldest attained his age of twenty years. And the opinion of the Lords Commissioners *Ashurst* and *Hotham*, was, that the interest which accrued from the eldest attaining twenty-one years of age, until the other attained that age, belonged to the children in equal moieties; for the accumulation was to cease then, and who could take the interest, but the persons intitled to the principal. Although the principal was contingent till they came of age, that did not prevent the dividends from vesting.

above cited, it was determined that the two nephews took immediately, and that the trustees had only a chattel-interest out of the freehold in the nephew.

Goodtitle v. Whitby. Supra, p. 171. and vide Tomkins v. Tomkins, cited i Burr. 234.

This observation, however, cannot apply to cases where the devisee is not a person *in esse*, or where no present interest is devised in the mean time, or where there are express and operative *conditional* words to suspend the vesting; as in the above cited case of *Bullock v. Stones*, the devisee not being *in esse*, the estate could not vest in him immediately; but must, as to him, operate *futurely* as an executory devise: and in the case of *Brown-sword v. Edwards*, the words preceding and introducing the limitation to *B. viz. if he should live to attain the age of twenty-one, or have issue, then to him, &c.* made the devise to him expressly *conditional*, and to depend upon the events there mentioned; and of consequence prevented any estate from *vesting* in him until one of such events should happen. These two cases were limitations in tail, but had they been in fee, these same reasons would have existed against their vesting immediately.

Vide supra, p. 397.

(439)

I have

2 Roll. Rep.
129.
4 Rep. 66. b.
10 Rep. 50.
b. 11 Mod.
127. 152.
Moor 806.
1 Vez. 411.

I have in a former part of this treatise observed, that contingent estates in lands of freehold or inheritance, are not deviseable, *i.e.* whilst they are contingent (a). But it is otherwise in regard to contingent and executory interests in terms and other personal estates. It appears indeed, that at common law a possibility has been held, not to be deviseable; though a distinction in this respect, it seems, has been taken between *interests in contingency* and *naked possibilities*. Nor was a possibility assignable, though it might be released in certain cases; but however, there are many determinations by the court of Chancery, which prove that at this day possibilities of personal estates are *deviseable*, as well as *assignable*, in equity.

(a) *Sed. vid.* vol. 1. 545. Where Mr. Fearn, considers the cases of *Moor* vers. *Hawkins*, and *Roe* v. *Jones*, stated *ibid.* 542. 3. as having on solid grounds, established the power of testamentary disposition of contingent and executory estates, and possibilities, *accompanied with an interest*, and of such as would be descendible to the heir of the *object* of them dying before the contingent event, on which the vesting or acquisition of the estate depended; *et* note Mr. Fearn's distinctions there taken.

Thus,

Thus, where a testator possessed of a term, devised it after his wife's death to his son, and made his wife executrix, who proved the will, and consented to the legacy; afterwards the son died in the life-time of his mother, having devised the lands comprized in the said term; and the court held that the devisee of the son, should enjoy under his will, against the representatives of the mother.

(440)
Veizy v. Pin-
well.
Pollex. 44.

So where a testator possessed of a term for 1000 years, devised it to *B.* for 50 years if she should so long live, and after her decease to *C.* and died; *C.* assigned it to *D.* during the life of *B.*; this assignment was held good.

Kimpland v.
Courtney.
2 Freem.
250.

So in another case, a testator devised his term to his wife for life, remainder to his son and daughter and died; the daughter and her husband, in the life-time of the wife assigned their moiety; and after the death of the brother, living the mother, they assigned the other moiety; this assignment was established in Chancery, and also by the House of Lords.

Theobalds v.
Duffey. 9
Mod. 101. 2
P. W. 608.

So where a term was devised to *A.* for life, remainder to *B.*; *B.* in the life-time of *A.* devised his remainder to *J. S.* who devised it

Wynd v.
Jekyl. 1 P.
W. 572.
And vide
2 P. W. 608.

it over; and Lord Chancellor *Parker* decreed, that the administrator *de bonis non* of *B.* should assign over the term to the devisee of *J. S.* to whom *B.* had devised it.

Higden v.
Williamson.
3 P. W. 132.

(441)

Again, where there was a devise of lands to be sold, and the money arising therefrom to be paid to such of the children of *B.* as should be *living at her death*; one of her children in her life-time became a bankrupt; and it was held, that the assignment by the commissioners, passed the contingent share which he became intitled to upon his mother's decease, as he survived her.

The court it seems, will go so far as to establish assignments of contingent interests against volunteers, even where such assignments are made, not for consideration of money, but, in consideration of love and affection, and advancement of children.

Wright v.
Wright.
1 Vezey 409.

Thus, where a testator devised lands to his two daughters and their heirs, but that if either of them should marry without the consent of his executors, the daughter so marrying should have only an estate for life therein; and if either of them should die unmarried, his son *R.* or his heirs should take it to him and his heirs, paying 500 *l.* to the other daughter.

R. in

R. in the life-time of both his sisters, in consideration of *natural love and affection* to his youngest son G. and for his *advancement*, grants to his son G. the said lands, &c. and all his estate, claim, &c. After R.'s death, one of the daughters died unmarried, and thereupon the eldest son of R. brought his bill to have the estate, on payment of the 500 l. to the other daughter, who had married with consent.

Lord *Hardwicke* said, it was a claim by the heir at law against the act of his ancestor, done for what the court calls a *consideration in the second degree*, a provision or advancement for a younger child; that this was an executory devise to R. and his heirs; in which case if the first person dies before the contingency happens, his heir takes by descent through him: that the court admits the contingent interests of terms for years, to be disposed of for valuable consideration, though the law does not; and further permits them to be disposed of by will; and that he should not doubt, that in the case of an assignment of a contingent interest in a term for years, not for money, but for a younger child, the court would make it good. That as to the principal case being a possibility of an *inheritance*, there

(442)

Vide infra,
P. 444.

there was no difference in the reason of the thing, between that and the allowing an *assignment* of the possibility of a *chattel real*.

Beckley v.
Newland.
2 P. W. 182.
187.

That the cases of *Beckley v. Newland*, and of *Hobson v. Trevor*, were considerable; and the latter went a great way; in the former of these cases the court established an agreement between two husbands, that all legacies which should be given to either of them by the will of T., whose presumptive coheirs they had married, should be divided between them, their respective executors and administrators; and in the latter an agreement by A. on the marriage of his daughter, to settle one third part of all such *real estate* as should descend to him on the death of his father, was carried into execution by the court; notwithstanding the expectancy of an heir at law in the life of his ancestor, is less than a possibility; but yet it is such as he might bind, by levying a fine of the lands in the life of his ancestor, which could operate by way of estoppel after the descent.

(443)
Hobson v.
Trevor,
2 P. W. 191.

That in those cases the transaction was established on the footing of an agreement for valuable consideration, to which an assignment seemed nearly allied; for that an assignment

ment operates by way of agreement or contract; which the court considers as the engagement of the one to transfer and make good a right and interest to another.

That the consideration in the principal case was not so strong as for money; and if the question had been between the child so advanced and a *bonâ fide* creditor, the equity of the creditor would have prevailed. But such advancement was a consideration, as against any claiming *voluntarily* from the father, as executor, administrator or heir at law.—Upon these grounds Lord *Hardwicke* held, the eldest son of *R.* had no right to the redemption of the lands upon the payment of 500 *l.* and dismissed the bill with costs.

By this case, it seems, that an assignment of a contingent interest, even in lands of inheritance for valuable consideration, may be carried into execution by the court of Chancery; upon the ground of its being such a contract or agreement, as the court may think fit to decree a specific performance of. (444)

And that such contingent executory interests or possibilities in lands of inheritance, may be passed at law by fine by way of estoppel, appears by the authorities and cases I have cited above,

Supra, p. 287.
& seq.

Vid. Bro.
Fines, pl. 109.
Sir W. Jones,
495.

above, when treating of contingent remainders; for it is wholly immaterial as to the operation of a fine, whether the future interest of the person levying it, in the lands of which it is levied, is a contingent remainder, or any other future or executory interest; the fine equally operates by way of estoppel to the person levying it, and those claiming under him (a).

There

(a) Mr. *Fearne's* observations in this passage, must be confined to contingent executory interests, of freehold lands of inheritance only, for a fine cannot be levied of copyholds, and a surrender of copyholds will not have the effect of a fine in respect of freeholds, for a fine operates in this case by way of estoppel to the person levying it, and those who claim under him; but it seems to be settled by the case of *Goodtitle* vers. *Morfe*, 3 *Term Reports* 365. that a surrender of copyholds *where no estate passes* cannot operate by estoppel; which latter case was decided on the authority of what Lord *Hardwicke* said, in the case of *Taylor* and *Philips*, 1 *Vez.* 229. (viz.) "a fine differs from a surrender of copyholds, for a fine will be good against the heir by estoppel, although it passes no estate at all, but if a surrender, is not good (*i. e.* does not pass the estate to the lord) there will be no estoppel;" and no estate can pass into the hands of the lord in such case, because the surrenderor has no estate, but only a possibility or right, which cannot

There still remains another property of executory devises to be taken notice of; which belongs

not be transferred to the lord, and consequently is not bound by the surrender.

But where the inheritance of a copyhold, is in any one or more persons, subject to a contingent right in another person, a release from the latter to the former by way of extinguishment will, it seems, discharge such interest. For it is a maxim in law, "that every right or title or interest *in presenti* or *in futuro* by the joining of all who may claim any such right, title, or interest, may be barred or extinguished;" vid. *Lampet's case* 10 Rep. And in *Jones v. Roe*, stated *supra* vol. 1. 544. a distinction was taken by Lord Kenyon Chief Justice, and Mr. Justice Buller between mere possibilities, like that which an heir has from his ancestor, which is nothing more than the mere hope of a succession, which is not the object of disposition, and the disposition whereof would be void, and a possibility or contingency coupled with an interest, under which latter class they considered the right which passes by an executory devise fell. And Willes Chief Justice in *Goodtitle* and *Gurnell* cited by Lord Kenyon in *Jones v. Roe*, said "executory devises were not *naked* possibilities, but in the nature of Contingent Remainders." And if executory devises communicate to the devisee a right to the copyhold, it has been settled in a variety of

Vid. *supra*
p. 286.

belongs to them in common with contingent remainders; what I mean is, that an execu-

cases, that one who hath a right to a copyhold may release it by deed or copy, to one that is admitted tenant, and by such release his right is extinct, and he is barred; and the reason is because the lord is not prejudiced thereby, for he has had his fine upon the admittance, and he to whom the release is made is in by title, viz. by the admittance of the lord, *vid. Co. Litt. 59. a. Hetley 150. 4 Rep. 25. Co. Camp. Copyh. 50. S. 3. b. Vin. Abr. Copyh. Z. a 74.*

But if there be uncertainty in the person to take under such executory devise, it seems that no release can be made; as if it were limited to the right heirs of J. S. there a release by the eldest son of J. S. would be void, because this is a mere possibility, for it is uncertain whether he will be right heir at the death of his father. *Vid. 10 Rep. 51.* Accordingly Lord Mansfield qualified what he said in *Roe v. Griffiths*, 1 *Blackp. Rep.* 605. as to the case of *Selwin v. Selwin*, for his Lordship said, "that in *Selwin v. Selwin*, he was prepared to have shewn that in all contingent springing and executory uses, where the person to take is certain, so that the same may be descendible, they are also devisable."

But in the latter case I apprehend persons might bind such executory interest in equity by an agreement for a valuable consideration. *Vid. Hobson v. Trevor* stated by Mr. Fearne *supra* 442, 3.

tory

tory interest, whether in real or personal estate, is transmissible to the representative of the devisee, when such devisee dies before the contingency happens; and if not before disposed of, will vest in such representative when the contingency happens.

Thus, in the case of *Pinbury v. Elkin* above cited, where the testator in case his wife should die without issue by him, then *after her decease*, he gave 80*l.* to his brother. After the testator's death, the brother died in the life-time of the widow, who afterwards died without leaving any issue. The court held that this possibility devolved to the executors of the brother, though he died before the contingency happened; and decreed the legacy accordingly, with interest from the widow's death.

(445)
Pinbury v.
Elkin.
supra, p. 359.
Vid. 1 P. W.
356.

And so, where the testator devised land to his son *B.*, but if he should die without issue-male of his body *then living*, or which might be afterward born, that then his daughter should receive at her age of twenty-one, or day of marriage, which should first happen, the sum of 3500*l.* (over and above a portion before bequeathed her) but in case the contingency of his said son's dying should not hap-

Car. Temp.
Talb. 117.
King v.
Withers.

pen before his daughter's said age or day of marriage, that then she should receive that sum whenever such contingency might happen, and charged the said legacy or portion on the real estate. The daughter married, having attained her age of twenty-one, and died in the life-time of her brother *B*, who afterwards died without issue-male: Lord *Talbot* decreed that the legacy should be raised, for the benefit of the administrator (the husband) of the daughter: and he held, that though it did not absolutely vest, because it might never arise, yet it so far vested as to be transmissible to the representative. This decree was afterwards affirmed in the House of Lords.

(446)
3 P. W. 414.

Vin. v. 8. p.
112. ea. 38.
Garnel v.
Wood.

So where a testator devised to *A*. and his heirs, and if *A*. should die before twenty-one, then to *B*. and his heirs: *A*. died before twenty-one, but *B*. died before him. The question was, whether *B*'s heirs should take? It was objected, that the limitation to *B*. upon *A*'s dying before twenty-one, was but an *executory devise*, and that such devises have always been construed as possibilities only. But the court held clearly, that although *B*. died in the life-time of *A*., yet *B*'s heirs might well take under the *executory devise*; as such devise was to be considered equivalent in point

point of interest, to a contingent remainder, and consequently transmissible. And so where legacies were devised to children to be transferred to them at their respective ages of twenty-one or days of marriage; and that in case any of them should die under that age, or marry without consent, &c. his or her share should go to the others at their ages of twenty-one. Lord *Hardwicke* held, that a share accruing by the forfeiture of a child's marrying without consent, vested in another child who attained twenty-one but died before such forfeiture, so as to intitle the personal representative of such deceased child, to an equal share thereof, with the other surviving children; for (said he) where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life-time of the devisee; yet if real *his heir*, and if personal *his executor* will be intitled to it: for though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable, and is transmissible to the representative of devisee.

Chauncy v. Graydon,
2 Atk. 616.

(447)

So where *B.* in consideration of natural love and affection for her niece, and to secure to her separate use her personal estate after her

Peck v. Parrot, 1 Vez.
234.

own decease, granted all her personal estate to trustees in trust for herself during her natural life, and *after her decease* and payment of her debts and funeral expences, in trust for the sole and separate use of her niece alone and not for her husband, or for such person as she should appoint. The niece died in the life-time of *B.*, and after *B.*'s death, her (*B.*'s) executor and residuary legatee filed his bill against the personal representative of the niece for this personal estate.

And vide
1 V. z. 47.
2 V. z. 118,
119.

(448)

Lord *Hardwicke* said, that under a trust, a contingent interest might go to the executor or administrator, though not vested in the person during his life; and that in the same manner the contingent interest here would go to the representative of the niece, and accordingly dismissed the bill.

Goodright v.
Searle,
2 Will. 29.

And in another late case of an executory devise of real estate, where the testator devised lands to his son *G.* his heirs and assigns for ever, but if he happened to die under the age of twenty-one years, *leaving* no issue, then he devised the lands to his (the testator's) mother *P.* in fee. After the decease of the testator, his mother died in the life-time of *G.* who afterwards died under age and without issue; and it was held, that by virtue of the
executory

executory devise to *P.* the lands vested in her heir at law upon the happening of the contingency, viz. upon the decease of *G.* under age without issue; and that this interest, whilst it was contingent and before the event happened, did not so attach in *G.* who was heir at law of *P.* upon her decease, as to carry it on his death to his heir at law, who was not heir at law to *P.*, but that it vested in that person who was heir at law of *P.* (the first purchaser) at the time the contingency happened.

And this indeed is agreeable to that rule of descent, which requires that a person who claims a fee-simple by *descent* from one who was *first purchaser* of the reversion or remainder expectant on a freehold estate, must make himself heir to *such purchaser*, at the time when that reversion or remainder falls into possession. So here the interest of *P.* was future, she had no seisin of the freehold; and therefore the person claiming by *descent* from her, must, by analogy to the above rule, be heir at law to her *when* the estate fell into possession. And as to the question started in that case, whether this executory interest did not by the descent of it from *P.* at her decease upon *G.* who was then her heir at law, be-

(449)

Vide Co. Lit.
11. b. 14. a.
15. a. 3 Rep.
42.

come merged in the fee which he took by descent from his father (the testator), it vanishes, when we consider that the executory fee devised to the mother, could have no existence before the decease of the son under age without issue; for upon *that event only* could it arise. Now, how was it possible for it to *merge* before it had any *existence*? If it could be extinguished by merger, it must be by its union with a greater estate out of which it was to arise, and of which it might be considered as part, or at least as an extraction. But how are two estates, to unite, or one to become blended and confounded with or absorbed in the other, when both are of equal measure; viz. both fee-simples; and of which the one cannot commence or partake of existence at all, but in an event which destroys and annihilates the other?

(450)

1 Eq. Abr.
400.
Dayrell v.
Champness.

Lastly, I shall observe, that in cases of contingent or executory interests, the court of Chancery will interfere in behalf of the persons intitled to such interests, to prevent unreasonable waste being committed by the tenants in possession, as appears in the case of *Dayrell v. Champness*. The court has even gone so far as to decree a restitution of the value to a contingent remainder-man, for waste

waste committed before the contingency happened, by the tenant in possession in collusion with the person intitled to the inheritance in remainder. As where *A.* being tenant for 99 years determinable on his life, without impeachment of waste, *except voluntary*, remainder to trustees to support contingent uses, remainder to the first and other sons of *A.* successively in tail, remainder to *B.* in fee; *A.* having no son then born, agreed with *B.* to fell timber and divide the profits; a son was afterwards born, and Lord *Hardwicke* decreed that the son should recover against the representatives of *B.* (a)

1 Vezey 524,
546.
Garth v. Sir
John Hind
Cotton.

(a) And where the tenant for life has also in himself the next existent estate of inheritance, subject to intermediate Contingent Remainders, he shall not take advantage of his own wrong in cutting down timber, but the court will preserve it for the benefit of the Contingent Remainder-men. As where *A.* was tenant for life, with Contingent Remainders to his first and other sons, with other Contingent Remainders over (with trustees to preserve all the Contingent Remainders,) remainder to *A.* in fee. All the Contingent remainders being yet in expectancy, *A.* cut down timber. And on a question between *A.* and a Contingent Remainder-man, not a son of *A.*, born after cutting the timber, as to the right to the timber, the Lord Chancellor was of opinion, that

as

as it was not competent for *A.* to cut down timber in respect of his life estate, he should not take advantage of his own wrong; that the timber, although by severance become personalty, was yet bound as far as it could be, to the uses of the realty. And there being then no person in being entitled to it, as *A.* might have a son, it was ordered that the value, together with interest from the time of the sale, should be paid into court, subject to further order with liberty for any person interested to apply. *Williams v. Duke of Bolton.* *Cox's notes, 3 P. W. 268.*

But in cases where there is no collusion or wrong done by the remainder-man, it has been held that the first taker of the inheritance is intitled to timber fallen by storm, or by the act of the party, and accordingly it was held by Lord *Thurlow*, in the case of *Lee v. Alston, 3 Bro. Ca. Chan. 37.* that if a party cuts timber on an estate in which he is not intitled so to do, it will draw an account; and that he must suffer himself to be considered as the bailiff of the remainder-man,

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